TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1931

No. 374

HARRY BLOCKBURGER, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 11, 1931

CERTIORARI GRANTED NOVEMBER 2, 1931

(36,188)

IN THE

United States Circuit Court of Appeals
For the Seventh Circuit

OCTOBER TERM, A. D. 1929.

No. 4389

HARRY BLOCKBURGER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Counsel for Appellant:
MR. HAROLD J. BANDY,

Counsel for Appellee:
MR. WALTER M. PROVINE,

Appeal from the District Court of the United States for the Southern District of Illinois, Southern Division.

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(36,188)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931

No. 374

HARRY BLOCKBURGER, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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1 Pleas in the district court of the United States of America, within and for the Southern Division of the Southern District of Illinois, held at the City of Springfield, in said Division and District, before the Honorable Louis Fitz-Henry, Judge of said Court, on Monday, the third day of June, in the year of our Lord one thousand nine hundred and twenty-nine and of the Independence of the United States of America, the one hundred and fifty-third year. Placita

Attest:

S. T. BURNETT,
Clerk.

2 IN THE DISTRICT COURT OF THE UNITED STATES

For the Southern District of Illinois,

Southern Division.

The United States of America
vs.
Harry Blockburger, alias Harry Blackburger, alias Harry Lang and Margaret Walker.

No. 1479. Indictment. Vio. Harrison Narcotic Act and Narcotic Drugs Import and Export Act.

Be it remembered that heretofore, to wit: on the 10th day of June, in the year of our Lord, one thousand nine hundred twenty-nine, that being one of the days of the June Term, A. D. 1929, of the district court of the United States for the Southern Division of the Southern District of Illinois, the Grand Jurors of the United States of America, chosen, selected and sworn, within and for the Southern Division of the Southern District of Illinois, came into open court and presented an Indictment against one Harry Blockburger, alias Harry Blackburger, alias Harry Lang and one Margaret Walker, for "Violation of Harrison Narcotic Act and Narcotic Drugs Import and Export Act" which said Indictment was signed by the District Attorney and indorsed by the Foreman of said Grand Jury as a True Bill and was and is in the words and figures, following, to wit:

3 IN THE DISTRICT COURT OF THE UNITED STATES Filed 1929

For the Southern District of Illinois,

Southern Division.

At the June Term thereof, A. D. 1929.

United States of America,
Plaintiff,
vs.
Harry Blockburger, alias Harry Blackburger, alias Harry Lang, and Margaret Walker,
Defendants.
} Docket No. .....

Southern District of Illinois,
Southern Division. } ss.

The Grand Jurors of the United States of America, impaneled, sworn and charged in the District Court of the United States of America, within and for the said Southern Division of the Southern District aforesaid, at the term aforesaid, of the court aforesaid, in the year of our Lord Nineteen Hundred Twenty-nine, and inquiring for said Southern Division of said Southern District, upon their oath present that Harry Blockburger, alias Harry Blackburger, alias Harry Lang and Margaret Walker, on, to wit, the Twenty-seventh day of May, in the year of our Lord Nineteen Hundred Twenty-nine, at, to wit, the City of Springfield, in the County of Sangamon, in the State of Illinois, in the said Southern Division of the Southern District aforesaid and within the jurisdiction of this court, did then and there violate the Act of Congress, approved December 17, 1914, as amended, (commonly known as Harrison Narcotic Act), in that, they, the said Harry Blockburger, alias Harry Blackburger, alias Harry Lang and Margaret Walker, did then and there knowingly, wilfully, unlawfully and feloniously sell a certain quantity of a certain derivative of opium, to wit, two grains of morphine hydrochloride to one Ella Rush; which said two grains of morphine
3A hydrochloride was not then and there in the original stamped package and from the original stamped package;

contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

WALTER M. PROVINE,
United States Attorney.

Second Count:

And the Grand Jurors aforesaid, inquiring as aforesaid, upon their oath aforesaid, do further present that Harry Blockburger, alias Harry Blackburger, alias Harry Lang and Margaret Walker, on, to wit, the Twenty-eighth day of May, in the year of our Lord Nineteen Hundred Twenty-nine, at, to wit, the City of Springfield, in the County of Sangamon, in the State of Illinois, in the said Southern Division of the Southern District aforesaid and within the jurisdiction of this court, did then and there violate the Act of Congress, approved December 17, 1914, as amended, (commonly known as Harrison Narcotic Act), in that, they, the said Harry Blockburger, alias Harry Blackburger, alias Harry Lang and Margaret Walker, did then and there knowingly, wilfully, unlawfully and feloniously sell a certain quantity of a certain derivative of opium, to wit, ten grains of morphine hydrochloride to one Ella Rush; which said ten grains of morphine hydrochloride was not then and there in the original stamped package and from the original stamped package; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

WALTER M. PROVINE,
United States Attorney.

Third Count:

And the Grand Jurors aforesaid, inquiring as aforesaid, upon their oath aforesaid, do further present that Harry Blockburger, alias Harry Blackburger, alias Harry Lang and Margaret Walker, on, to wit, the Twenty-ninth day of May, in the year of our Lord Nineteen Hundred Twenty-nine, at, to wit, the City of Springfield, in the County of Sangamon, in the State of Illinois, in the said Southern Division of the Southern District aforesaid, and within the jurisdiction of this court, did then and there violate the Act of Congress, approved December 17, 1914, as amended, (commonly known as Harrison Narcotic Act), in that, they, the said Harry Blockburger alias Harry Blackburger, alias Harry Lang and Margaret Walker, did then and there knowingly, wilfully, unlawfully

and feloniously sell a certain quantity of a certain derivative of opium, to wit, eight grains of morphine hydrochloride to one Ella Rush; which said eight grains of morphine hydrochloride was not then and there in the original stamped package and from the original stamped package; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

WALTER M. PROVINE,
United States Attorney.

Fourth Count:

And the Grand Jurors aforesaid, inquiring as aforesaid, upon their oath aforesaid, do further present that Harry Blockburger, alias Harry Blackburger, alias Harry Lang and Margaret Walker, on, to wit, the Thirty-first day of May, in the year of our Lord nineteen Hundred Twenty-nine, at, to wit, in the City of Springfield, in the County of Sangamon, in the State of Illinois, in the said Southern Division of the Southern District aforesaid and within the jurisdiction of this court, did then and there violate the Act of Congress of February 9, 1909, as amended, (commonly known as the Narcotic Drugs Import and Export Act), in that, they, the said Harry Blockburger, alias Harry Blackburger, alias Harry Lang and Margaret Walker, did then and there knowingly, wilfully, unlawfully, fraudulently and feloniously receive, conceal, buy, sell and facilitate the transportation, concealment and sale of a certain narcotic drug, to wit, a certain derivative of opium, to wit, twenty grains of morphine
4 hydrochloride; which said twenty grains of morphine hydrochloride had theretofore been fraudulently imported and brought into the United States of America contrary to law; they the said Harry Blockburger, alias Harry Blackburger, alias Harry Lang and Margaret Walker, at the time of so receiving, concealing, buying, selling and facilitating the transportation, concealment and sale of said twenty grains of morphine hydrochloride as aforesaid, at the City of Springfield aforesaid, then and there well-knowing the same to have been so fraudulently imported and brought into the United States of America contrary to law as aforesaid; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

WALTER M. PROVINE,
United States Attorney.

Fifth Count:

And the Grand Jurors aforesaid, inquiring as aforesaid, upon their oath aforesaid, do further present that Harry Blockburger, alias Harry Blackburger, alias Harry Lang and Margaret Walker, on, to wit, the Twenty-ninth day of May, in the year of our Lord Nineteen Hundred Twenty-nine, at, to wit, the City of Springfield, in the County of Sangamon, in the State of Illinois, in said Southern Division of the Southern District aforesaid and within the jurisdiction of this court, did then and there violate the Act of Congress, approved December 17, 1914, as amended, (commonly known as the Harrison Narcotic Act), in that, they, the said Harry Blockburger, alias Harry Blackburger, alias Harry Lang and Margaret Walker, did then and there knowingly, wilfully, unlawfully, fraudulently and feloniously sell, barter, exchange and give away to one Ella Rush a certain quantity of a certain derivative of opium, to wit, ten grains of morphine hydrochloride, which said ten grains of morphine hydrochloride was not then and there sold, bartered, exchanged and given away by them, the said Harry Blockburger, alias Harry Blackburger, alias Harry Lang and Margaret Walker, to the said Ella Rush, in pursuance of a written order of the said Ella Rush, to whom said ten grains of morphine hydrochloride
5 was so sold, bartered, exchanged and given away as aforesaid, upon a form theretofore issued in blank for that purpose by the Commissioner of Internal Revenue; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

WALTER M. PROVINE,
United States Attorney.

Endorsed: A True Bill, F. C. Hall, Foreman.

Endorsed: Filed in Open Court this 10th day of June, A. D. 1929. S. T. Burnett, Clerk.

Bail $5000.

FITZHENRY.

6 And afterwards, to wit: on the 20th day of June, A. D. 1929, the following further proceedings were had in said court in said case and were entered of record, to wit:

7 * * (Caption) * * Entered 1929.

Thursday, June 20, 1929.

Court met pursuant to adjournment.

Present, the Honorable Louis FitzHenry, Judge.

And now on this 20th day of June, A. D. 1929, comes the United States the plaintiff in this case by Walter M. Provine, Esq., United States Attorney for the Southern District of Illinois and comes also the defendant Harry Blockburger, alias Harry Blackburger, alias Harry Lang, in his own proper person and by Messrs. H. J. Bandy and F. O. R. Baker, his Attorneys, and the said defendant being arraigned on the Indictment herein for plea thereto says that he is not guilty as therein charged. The defendant by his attorneys moves the court to suppress the evidence herein.

The United States
vs.
Harry Blockburger, alias Harry Blackburger, alias Harry Lang and Margaret Walker.
} No. 1479. Indictment Vio. Harrison Narcotic Act, etc.

And now on this 20th day of June, A. D. 1929, comes the United States, the plaintiff in this case by Walter M. Provine, Esq., United States Attorney for the Southern District of Illinois, and comes also the defendant Harry Blockburger,
8 alias, etc., in his own proper person and by Messrs. H. J. Bandy and F. O. R. Baker, his attorneys and comes also the defendant Margaret Walker, in her own proper person, and the said defendants being arraigned on the indictment herein for plea thereto, each for himself says that he is not guilty as therein charged.

And afterwards, to wit: on the 28th day of June A. D. 1929, the following further proceedings were had in said court in said case and were entered of record, to wit:

9 * * (Caption) * *

Friday, June 28, 1929.

Court met pursuant to adjournment.

Present, the Honorable Louis FitzHenry, Judge.

And now on this 28th day of June, A. D. 1929, comes the United States, the plaintiff in this case by Walter M. Provine, Esq., United States Attorney for the Southern District of Illinois and come also the defendants Harry Blockburger, alias Harry Blackburger, alias Harry Lang and Margaret Walker, in their own proper persons and by Messrs. F. O. R. Baker and H. J. Bandy, their attorneys and the said defendant having each heretofore entered a plea of not guilty herein and issue now being joined, the following named jurors are tendered and accepted, to wit: Ralph Farrand, H. A. Smith, John W. Rogers, Jr., Roy E. Thompson, Chas. Turley, Harry McLean, Elmer O. Good, Glen Hartman, Jesse Boyd, H. McPherson, J. G. Delicate and Fred C. Boice, who are duly sworn to well and truly try the issues joined in this case and a true verdict render according to the law and the evidence and after hearing the evidence on behalf of the United States the United States Attorney says that he will no longer prosecute counts two, three, four and five of the Indictment herein as against the defendant Margaret Walker, whereupon, it is ordered by the court that said counts as to said defendant Margaret Walker, be, and they are each hereby dismissed, and after hearing the evidence on behalf of the defendants, the hour for adjournment having arrived, the further trial hereof is postponed until 9 o'clock A. M. tomorrow.

10 And afterwards, to wit: on the 29th day of June A. D. 1929, the following further proceedings were had in said court in said case and were entered of record, to wit:

11 * * (Caption) * * Verdict E June 29

Saturday, June 29, 1929.

Court met pursuant to adjournment,

Present: The Honorable Louis FitzHenry, Judge.

And now on this 29th day of June, A. D. 1929, comes again the United States, the plaintiff in this case by Walter M. Provine, Esq., United States Attorney for the Southern District of Illinois and come also the defendants Harry Blockburger, alias Harry Blackburger, alias Harry Lang and Margaret Walker, in their own proper persons and by Messrs. F. O. R. Baker and H. J. Bandy, their attorneys and comes also the jury impaneled and sworn herein and the further trial hereof is resumed. And after hearing the remainder of the evidence in the case, the arguments of counsel and the instructions of the court, the jury retired in charge of a sworn officer to consider a verdict, and afterwards comes into open court and for verdict says, "We, the Jury, find the defendant Harry Blockburger, alias Harry Blackburger, alias Harry Lang guilty on counts two-three-and five and ~~not~~ guilty on counts one and four and the defendant Margaret Walker, not guilty. Thereupon the said defendant Harry Blockburger, alias Harry Blackburger, alias Harry Lang, by his attorneys, then and there entered a motion for a new trial.

12 And afterwards, to wit: on the 20th day of July, A. D. 1929, the following further proceedings were had in said court in said case and were entered of record, to wit: Entered 1929.

13 * * (Caption) * *

Saturday, July 20, 1929,

Court met pursuant to adjournment

Present: The Honorable Louis FitzHenry, Judge.

And now on this 20th day of July, A. D. 1929, comes the United States the plaintiff in this case by Walter M. Provine, Esq., United States Attorney for the Southern District of Illi-

nois, and comes also the defendant Harry Blockburger, alias Harry Blackburger, alias Harry Lang, in his own proper person and by H. J. Bandy, Esq., his attorney and the court having heard the arguments of said attorneys on the motion of said defendant for a new trial and being thus fully advised in the premises, it is ordered that said motion be, and is hereby denied; thereupon the said defendant by his attorney entered a motion in arrest of judgment and the court having heard and duly considered the same, it is ordered that said motion be, and is hereby denied.

And the said defendant Harry Blockburger, alias Harry Blackburger, alias Harry Lang, now being arraigned at the bar of the court for sentence and having nothing further to say why sentence should not be pronounced against him—It is therefore considered and adjudged by the court that the said defendant Harry Blockburger, alias Harry Blackburger, alias Harry Lang, for the offenses by him committed in manner and form as charged in counts two, three and five of the indictment herein and as found by the jury in this case be confined in the United States Penitentiary, at Leavenworth,

Kansas, for a period of five years on each of said counts,

14 the said imprisonment on said counts to run consecutively and in the order of their number that is imprisonment under count three to follow imprisonment under count two and imprisonment under count five to follow imprisonment under count three; and that he pay a fine to the United States in the sum of two thousand dollars on each of said counts, making a total fine of six thousand dollars, together with the costs of this prosecution, amounting to the sum of 60 dollars, that execution issue therefor and that said defendant also stand committed in the said United States Penitentiary at Leavenworth, Kansas, until the amount of said fine and costs shall have been fully paid or until otherwise discharged by due process of law.

On motion of said defendant, is is ordered by the court that the said defendant have thirty days in which to prepare and file a bill of exceptions herein.

15 And afterwards, to wit: on the 16th day of May, A. D. 1930, there was filed in the office of the clerk of said court, a certain Bill of Exceptions (in narrative form) which said Bill of Exceptions is in the words and figures, as follows:

16 BILL OF EXCEPTIONS.

Bill of Exceptions filed May 16

Government's Evidence.

Record Page.

4 ELLA RUSH, testified as follows:

Direct Examination.

My name is Ella Rush. I live at Twentieth and Olive Street, St. Louis, Missouri.

5 I have known the defendant, Margaret Walker, since May 27th, 1929. I met her at 101 Adams Street, Springfield. I went down to her house and told her I was with a Carnival, and that I wanted some morphine. She said she didn't handle any of it herself, but she would see what she could do for me. I told her where I lived, and at about eight o'clock that night she told me to be ready at about eleven.

6 Mr. Bandy: We object on behalf of the defendant Blockburger, to any conversation out of his presence.

The Court: The objection will be sustained as to the defendant Blockburger and overruled as to the defendant Walker.

Witness (continuing): She came back about eleven o'clock and I walked down to Eighth and Washington and

7 met Mr. Blockburger. She made me acquainted with Mr. Blockburger, and I told him what I wanted. He said he didn't know whether he could get me any that night or not. I told him I didn't have any, and gave him Two Dollars. He went away and was gone from three to five minutes. Mrs. Walker and I went in a restaurant

17 and waited. He came back and the three of us went outside and stepped into a doorway where he gave me a cube of morphine. It was wrapped in a piece of paper. I told him I wanted some more, and he said, "Well, give me the money." I gave him Eight Dollars, and in about twenty minutes after two the next morning, he brought it to my room.

8 I gave Margaret Walker Ten Dollars in my room at the hotel. I was stopping at the Huskey Hotel in Springfield. After Mr. Blockburger gave me the cube of morphine, I saw him the next morning, which would be May 28th, at my room in the Huskey Hotel.

9 He brought me Eight Dollars' worth of morphine, which would be about ten grains. It was wrapped in paper. No money transferred at that time. Mr. Blockburger came to my room about eleven or eleven thirty on the 28th, and I gave him Ten Dollars to get me Ten Dollars' worth of morphine.

10 He said he did not like to bring it to the hotel, and that he would call me up. About two o'clock on the 29th, he called me and told me to be at the same restaurant at Eighth and Washington.

11 I went into the restaurant, and Mr. Peterson, a narcotic agent, came in and sat down at the table. I was sitting at the counter. Mr. Blockburger came in the back way, and sat down on the left hand side of me and handed me the package of morphine. He told me he would see me at the Carnival grounds. I went out, and Mr. Peterson followed me, and I handed him the package of morphine that I got from Mr. Blockburger.

12 18 I did not change the character of the contents of the package during the time I had it in my possession. The next day, which would be the 30th, Mr. Peterson and I met Mr. Blockburger and he told me that he couldn't let me have any stuff that evening, because someone had gone out of town for it and hadn't returned, that I should meet him at the Carnival grounds, and that if I could show him anyone that knew me and Mr. Peterson, everything would be all right and we could get all we wanted.

13 I told Mr. Blockburger that Mr. Peterson was my man.

14 I gave the cube of morphine, which I purchased on the first day, to Mr. Peterson, and I also gave the morphine which I purchased on the second and third occasions to him. Margaret Walker uses morphine. I have seen her take it.

Cross-Examination.

16 I worked for Mr. Peterson for about two months. He pays me three dollars a day. I have received that salary since March.

17 I am not in the service of the United States. I am an addict. I have never been arrested or convicted.

When I came to Springfield I didn't work at the Carnival. I lied when I told Mrs. Walker that I was working there. When I told her I wanted morphine for my own use, I was misrepresenting the facts.

I came to Springfield for the purpose of helping Mr. Peterson. When I told Mrs. Walker that he was my man, I lied. Mr. Peterson and I both came to help Mr. Howard.

He gave me some names and told me to see them. I gave Mrs. Walker Ten Dollars to make me acquainted with someone I could buy morphine from. That was about eleven o'clock on the night of May 27th.

Mr. Peterson was trailing me when I met Mr. Blockburger.

Mr. Howard gave me the money and told me to buy morphine. He told me to go see Blockburger and see if he would sell. I gave Blockburger Ten Dollars on the 28th. I don't know where Peterson was when this transaction took place.

I did not use any of the morphine that I got in these cases. I used my own.

Redirect Examination.

I did not on any of the occasions about which I testified, give Mr. Blockburger a written order for the morphine or any part of it which I obtained from him. The packages containing morphine that I received from Mr. Blockburger did not have revenue stamps on them. I gave them to Mr. Peterson in the same condition as they were when I received them from Mr. Blockburger.

Recross Examination.

I have taken morphine today. I told Mrs. Walker that my husband was a pickpocket travelling with the Carnival. That wasn't true.

BERNARD PETERSON testified as follows:

32 My name is Bernard Peterson. I live in East St. Louis. I have been a narcotic agent employed by the Government for six years.

33 I have known Ella Rush since May, 1929. I brought her to Springfield with me on May 25th. No one else came with us.

34 The first time I saw Harry Blockburger, he was coming through the rear door of a restaurant near Eighth and Washington. That was on the 29th of May, 1929. I was sitting at a table in the restaurant. I saw Ella Rush there also. We followed her from Fifth Street to the restaurant.

35 She went in and sat down at the counter. I was in the back part seated at a table. Mr. Blockburger came through the back door and sat down on a stool, near her, and handed her a package. They talked a while, but I did not hear what was said. She got up and walked out—I followed her for a minute or two, and then went west on Eighth Street. She handed me the package she had in her hand.

36 I took a part of that package and made a sample of it. It was sent in a sealed envelope and mailed to the chemist in Chicago. I did not change the character of the substance in any way. There were no revenue stamps on the package. There was about ten grains in it. I

37 turned the remainder of it over to Mr. Howard.

38 21 At about twelve o'clock on the night of May 27th, Ella Rush came to the Empire Hotel where I was stopping, and gave me a cube of morphine. It was wrapped in a newspaper.

39 I saw a Government's exhibit 3 on May 29th, 1929. I obtained it from Ella Rush. The substance contained in the envelope is the same as it was when I received it.

40 Government's exhibit 1 was handed to me at the Empire Hotel, by Ella Rush, on the night of May 27th, or the morning of May 28th, 1929. During the time that I had the exhibit, I made no changes in the contents.

41 I gave samples of it to Mr. Howard. There were no revenue stamps on the package, when Ella Rush handed it to me. It was wrapped in paper. Exhibits 1 and 2 are in the same paper that they were when they were

handed to me. Neither of them were in stamped packages. Government's Exhibit 2 was handed to me by Ella Rush on May 28th, 1929. It had no revenue stamps on the package. It is in the same condition as it was when I received it.

43 I put Exhibits 1, 2 and 3 in envelopes and marked them. I put the wrappings in the envelopes with the
44 morphine. The large envelope, which is Government's Exhibit 4, was delivered to Mr. Howard, and was taken by him to his office in Peoria. He gave it to me in the court room just now. I saw Mr. Blockburger in Springfield on the 30th day of May. He was with Ella Rush.
45. 22 Ella Rush introduced Mr. Blockburger to me. She introduced me as her man. She called him "Mr. Lang." She asked him when she could get some more
46 morphine. Mr. Blockburger said that he could not find that she had ever been at the Carnival, and asked me if I knew anybody out there, and I said "sure." He asked me if I knew Stephens. I had never heard of him, but I said "yes" anyhow. He said, "Meet me out there at eight o'clock tomorrow evening, "and if you can show me that anybody knows you, I will sell you all the morphine you want." He said, "You might be Government men. They have five or six counts against me now. I will do anything once, but I'm not going to take any chances."

Mr. Bandy: Did he say that three or four times, as you state?

Mr. Alexander: We object to cross-examination.

Mr. Bandy: I want to know what the conversation was.

The Court: You may examine him about that on cross-examination.

To which ruling of the Court the defendant excepted.

47 I told him I would meet him there the next night, and show him I was all right. I never saw him after that.

Cross-Examination.

I am a narcotic agent. I permit myself to be introduced as a pickpocket. I was not a pickpocket. I was
48 not her man. When I said that I was her man, I wasn't. Probably nothing that I said to Blockburger at that

time was true. I am telling the truth now. When
49 23 I said that I was not a pickpocket, I was telling the truth.

Redirect Examination.

During the month of May, 1929, I paid Ella Rush Three Dollars a day. I charged this to my expense account.

50 *Recross Examination.*

I charged the amount I paid her to expenses for an informer.

51 FRED SMITH testified as follows:

My name is Fred Smith. I live in Chicago, Illinois. I was in Springfield for a period of six weeks, beginning with May 27th, 1929. I was an informer for the Government.

52 I saw the defendant Blockburger on the night of the 27th of May, 1929, at Eighth and Washington Streets. He was with Ella Rush and Mrs. Walker.

53 They went into a restaurant, remained there a few minutes, and he came out alone. He was gone about five minutes, and then came back. All three of them went out of this restaurant, stepped into a doorway, and I saw him hand her a package. Ella Rush left after that, and went to her room.

Cross-Examination.

I followed Ella Rush from the Huskey Hotel that night. I have been a government informer for three years. I work for Agent Belco. I am not appointed by the Government.

54 I use morphine.

55 I have never been arrested for it. I have had
24 morphine today. I am here trying to make cases against people. I get paid for doing that.

56 GEORGE HOWARD testified as follows:

My name is George Howard. I live at Peoria, Illinois, and I am a narcotic agent employed by the United States Government. I have acted in that capacity for five years. I am acquainted with the defendant, Margaret Walker. I know the defendant Harry Blockburger. I saw him at the police station in 1929. The next time I met him was on the night of May 31st, 1929, when he was arrested.

59 Mr. Bandy: We are not going to attack the analysis which was made of the substance marked "Government's Exhibits 1, 2, 3 and 4."

Mr. Alexander: Well, we will offer the three exhibits, 1, 2 and 3.

Mr. Bandy: You may state what it is, if you want to.

60 JOHN R. MATCHETT testified as follows:

My name is John R. Matchett; I live at LaGrange, Illinois. I am a chemist for the Bureau of Prohibition, with post duty at Chicago. I have examined Government's exhibits 5, 6 and 7. They came to my office through the mail on June 7th, 1929.

61 The character of the contents of the substance is morphine hydrochloride.

25 Mr. Bandy: We will admit that the three samples examined by the witness are the same three samples that Mr. Peterson and Mr. Howard testified that they mailed to the witness for examination.

The Court: This is admitted.

62 We offer EXHIBITS 5, 6 and 7 in evidence.

Mr. Bandy: No objection.

The Court: Consider them admitted.

Mr. Alexander: Government rests.

63 Mr. Bandy: Defendant, Harry Blockburger, asks the Court to dismiss the fourth count, being a count which charges the violation of the Act of Congress of February 9, 1909, on the 31st day of May, 1929, because of the total absence of proof to support that count.

The Court: Motion denied.

To which ruling of the court the defendant then and there excepted.

65 Mr. Bandy: The defendant Blockburger again urges the motion for an election.

The Court: Election denied.

26 To which action of the Court the defendant then and there excepted.

Mr. Bandy: And at the conclusion of the Government's case, the defendants jointly and severally, asked the Court to dismiss the case as to all counts against them.

The Court: Motion denied.

To which ruling of the Court the defendants then and there excepted.

DEFENDANTS' EVIDENCE.

66 MARGARET WALKER testified as follows:

My name is Margaret Walker. I live at Springfield, Illinois. I am married and have two children. Ella Rush came to my house on Sunday afternoon of May
67 26th, 1929, and represented herself as Mrs. Mason. She said her husband knew my husband very well. She said that she heard about my husband being in trouble, and asked me if I couldn't get him out. I said, "It takes a little money," and she said, "I will take up a collection at the Carnival for you." She told me to come back Sunday, and that she would give me some money. I did, and she gave me ten dollars.

68 My husband was in jail at the time. She told me to come back Monday night, and she would have more. I just saw her on the two occasions. Nothing was said there in either of those conversations about drugs.

69 27 She asked me if I knew Harry Cline or a Harry Lang. I told her that I knew Harry Lang. She came to my house many times, and she wanted to know
71 how much it would cost to get my husband out. I said that I would have to see a bondsman, that lives on Washington and Eighth Street. She and I started there, and we ran across Harry Lang. I introduced Mr. Lang to her. She said that her husband was acquainted with

him; we went to a restaurant and while I was paying the check, she and Harry went outside.

72 There was nothing said in any conversation about morphine. I did not see Mr. Blockburger hand her any package.

73 I did not see where Mr. Blockburger went after we left the restaurant. That was on Monday night, the 27th. I saw this lady the next day, which was Tuesday. I did not see Harry Lang or Harry Blockburger give her Two Dollars while we were at the restaurant.

74 She came to my place about ten o'clock on Tuesday, May 27th, and said for the first time, that she was an addict, that she was very sick and wanted to know if I could get her something. She said, "I talked to this Harry Lang, and he claims he can get something for me." She never saw me take any morphine. I have never had any around my place.

76 *Cross-Examination.*

I have been an addict for about five years. I have known Mr. Blockburger for about a year. I knew him as Mr. Lang, but I do not know what business he was engaged in.

77 28 I know Mr. Howard and Mr. Walker. I talked to Mr. Howard in the hall of this building a few days ago.

82 Q. Didn't you say to me, "I would like to be a Government witness, but I will have to know what the Government will do to me before I testify."

Mr. Bandy: That is objected to, because it carries an inference without any proof, and because it is in the nature of a compromise.

The Court: She may answer.

To which ruling the defendant then and there excepted.

Witness (continuing): I never mentioned anything about being a Government witness. I know George Blockburger, the brother of the defendant, Harry Blockburger.

84 I had a conversation with Mr. Dilly this morning, in the presence of Mr. Howard. Mr. Blockburger's name wasn't mentioned to Mr. Dilly.

Q. I will ask you if you didn't tell Mr. Dilly that Mr. George Blockburger, the brother of Harry Blockburger, the defendant in this case, had asked you to take the stand and testify, that you had delivered morphine to Ella Rush, and if you didn't say that you told Mr. Blockburger you would not do that.

A. Mr. Blockburger's name wasn't mentioned to Mr. Dilly.

Mr. Bandy: We object to the question and answer, and ask that it be stricken and the jury instructed to disregard it.

29 The Court: This is the conversation that is supposed to have been had, and she answered the question that she never said that to Mr. Dillie or that in substance.

94 HARRY BLOCKBURGER, testified as follows:

Direct Examination.

My name is Harry Blockburger. I live at Springfield. I have lived here about nine years. I am selling women's ready-to-wear clothing. I have been in that business, off and on, for twenty years. I met Ella Rush about
95 eleven o'clock on Monday evening, May 27th. Mrs. Walker was with her at the time. Mrs. Walker told me that she was going to see Mr. Dudley about a bond for her husband. She said that Mrs. Mason, here, said that her husband knew me from St. Louis. We all went in the restaurant and drank some coffee. We talked about the Carnival and about Mrs. Walker's husband being in trouble. There was nothing said there about
96 morphine. I did not secure a cube of morphine on that night or any other night, and take it to her room at the Huskey Hotel. After coming out of the restaurant, I did not step into a stairway in the presence of Mrs. Mason and Mrs. Walker and hand a package of any kind to Mrs. Mason.

97 I did not receive any Two Dollar bill from Mrs. Mason, or from Mrs. Rush, who was the same person. I saw Mrs. Mason about nine o'clock in the morning on Tues-
98 day, May 28th. She knocked on my door—I opened it

and she stepped in. She said she was a user of mor-
30 phine, and wanted to know if I could get her an ounce, that she would be willing to pay Seventy-five Dollars for an ounce of morphine. I told her that I did not know anything about it, and didn't know where I could get it. She said she would be back to see me or come out to the grounds some time and that I should let her know if I found anybody that had any morphine for sale. I saw her again on Wednesday afternoon, May
99 29th, at the O & F Restaurant on Washington Street. I went in the restaurant to get away from her—didn't want to have anything to do with her. I went behind the stairs so that she could not see me. She came in, saw me, and wanted to know if I knew any place she could get an ounce of morphine.

100 There was a waitress, another man that I know, myself and this woman in the restaurant at this time. I did not see Mr. Peterson there. He was not in the restaurant. I did not hand Mrs. Mason a package of any kind there. I did not have any morphine to hand her.
101 That evening about ten thirty, I was walking on the west side of the square, and I saw her and Mr. Peterson. I tried to avoid her; she saw me and followed me to the square corner. By that time I was in front of the Illinois National Bank. She got me by the sleeve and asked me if I didn't hear her calling me. She said she wanted me to meet her man. About that time, Mr. Peterson came up. She wanted to know if I had found out where she could get some morphine. She introduced me to Mr. Peterson and they said they were from the South, and that around Louisville he could get all the morphine
31 he wanted. I told him that that would be a good place to go, because I didn't know any place where
102 he could get it. I did not say to them that if they could show me someone that they knew with the show, I could get them all the morphine they wanted. On Tuesday night I had been out to the Carnival and Mr. Stephens told me that Ella Rush was not with the show. I told them that they weren't with the show and that they were trying to get me in trouble. She said, "I'll tell you the truth." "We are not with the show. My husband is a-
103 pickpocket." Peterson admitted that he was a pickpocket. I told them I didn't want to be bothered with them any more. That was on May 29th, about ten thirty

in the evening. I met officers Jess Bourg and Williams on May 29th, at about two o'clock in the afternoon. I told them that this woman was trying to get me in trouble, and asked them why Howard would be sending
104 to me to buy morphine. These men are city detectives. That was before I was arrested on this charge. I complained to you (F. O. R. Baker) on Tuesday. She did not give me Eight Dollars on Tuesday the 28th, to purchase morphine. She never gave me any money to purchase morphine. She did not give me Ten Dollars the next day to buy morphine for her. On no occasion did I ever receive any money from her, nor did I give her any morphine. She never asked me to purchase morphine by the cube, pill or paper.
106 She never wanted to buy it any other way except by the ounce.

32 *Cross-Examination:*

I buy job lots of womens' ready-to-wear, dresses, hosiery and underwear, and sell them.
107 The last lot that I bought was shortly after the second of March; I disposed of it in Springfield. I don't know all the people that I sold it to, but I can name some. I sold Mrs. Liggins some on the 15th of March.
110 I can make a hundred percent, or better, on these sales. I bought a lot of goods about six weeks before the last one.
111 There are about twelve dozen pairs of hose to a lot. I was away about three weeks during the month of March.
112 I went to Cincinnati to purchase some goods from Schwartz and Cohn. I spent all of February in Springfield.
114 I have no other employment aside from what I have mentioned. I spend a great deal of time on the streets in Springfield. I am not personally acquainted with Henry Walker. I know John Smith, alias "Cookie" Smith.
115 Q. Do you know a man named William Bapple?
A. Yes.
Mr. Baker: I object, as improper cross-examination.
The Court: Let him answer.
To which action of the Court the defendant then and there excepted.

Witness: Yes, sir, I do.

33 Witness (continuing): I know Edward Lewis, sometimes known as "Clarke."

I am personally acquainted with Bapple. I have merely a casual acquaintance with the others.

116 I know John Mahoney, sometimes called "Speck". I know him to speak to. I don't think I have talked to him over a half a dozen times in six or seven years. I know Lloyd Hemstrett.

Q. When is the last time you talked to "Speck" Mahoney?

Mr. Bandy: That is objected to as being immaterial and not cross-examination.

The Court: I don't see the materiality of it but he may answer.

To which ruling of the court the defendant then and there excepted.

A. I don't know. I talked to him out there the other day in the court room. I don't remember just what day it was.

I know John Smith more than casually. I met him in
117 the restaurant and different places around town. I never associated with him.

Q. Now I will ask you if these men Henry Walker, John Smith, alias "Cookie" Smith, Edward Lewis, alias "Clarke", John Mahoney, known as "Speck" and Lloyd Hemstrett are not all known to you to be morphine addicts?

Mr. Bandy: We object, because it is immaterial, prejudicial and not cross-examination.

The Court: He may answer.

To which ruling of the court the defendant then and there excepted.

118 A. Well, I have heard of some of those fellows, I have heard about Hemstrett. In fact if you go out to a ball game they call him a dope head and everything like that, but to know that he actually uses it, I don't know, I have never seen him use any dope.

34 Mr. Alexander: How about the others?

Witness (continuing): I have never heard of Mahoney using dope, I heard that "Clarke" was a dope fiend, but I don't know it to be a fact. I went out to this show and inquired about the woman on Tuesday evening May 28th. I talked to Mr. Stephens the man-

ager of the concession and Mr. Miller, the owner of the show. I told them her name was Mason. They told
119 me they did not know her and that she wasn't with the carnival. I met her and "her man" in the restaurant the next afternoon. I told her that I did not know where she could get an ounce of morphine. She asked me if I
120 could get it or tell her where she could get it. The next time I met her and "her man" was Wednesday evening about 10:30. I told her that I had made inquiries and found that she was not with the carnival. It was on
121 this occasion that she told me "her man" was a pickpocket.

Q. Mr. Blockburger, I will ask you if you are not the same Harry Blockburger who is sentenced to the Missouri State Penitentiary and started to serve your sentence on March 6th, 1913, the sentence being for four years for the crime of burglary and larceny.

Mr. Bandy: That is objected to because it is prejudicial and improper and is not the proper way to prove the alleged fact that is contained in the question.

The Court: He may answer.

To which ruling of the court the defendants then and there excepted.

A. Yes, sir. That is true, February 18, 1913.

122 I met Mr. Jessberg and Mr. Williams at 2:30 in the afternoon of May 30, 1929.

Redirect Examination.

I started to serve my sentence and had about forty days of the sentence to serve when they offered me a pardon because of this man's confession. I don't re-
35 member the man's name that confessed he died in a St. Louis or East St. Louis hospital. I refused the
123 pardon at that time. I said that inasmuch as I had served that much time I would do it all, but after I had served three-fourths of my time Governor Gardner granted me a pardon and restored me to citizenship.

Recross Examination.

I was pardoned and had my citizenship restored in 1916 or 1917.

The confession which caused my release was made either in St. Louis or East St. Louis. I was in the penitentiary at the time and don't know just which place its was made.

Whereupon court adjourned until 9:00 A. M. Saturday, June 29, 1929.

GOVERNMENT'S EVIDENCE IN REBUTTAL.

GEORGE HOWARD, testified as follows:

Direct Examination.

I am the same George Howard that testified before in this case. I have been about the Court Room and in the lobby to the court room during the past three or four days. I had a conversation with Mrs. Margaret Walker during the last three or four days.

Q. Did she approach you or did you approach her?

A. She approached me.

Mr. Bandy: We object to that question and answer and ask that it be stricken.

The Court: He may answer.

To which ruling of the court the defendant then and there excepted.

Mrs. Walker came to me and said that she would like to be a Government witness in this case and that before becoming a Government witness she would want to know what the Government would do for her. I told her that she would have to talk to the United States Attorney about that. She said that she would like for me to arrange for her to talk to the United States Attorney. I was present in the office of the United States Attorney when Margaret Walker and Mr. Bille had a conversation. Mr. Peterson wasn't there.

Q. I will ask you whether or not Margaret Walker on that occasion said in your presence this or this in substance, that George Blockburger, a brother of the defendant Harry Blockburger, had asked her, Margaret Walker, to take the witness stand in the trial of this case and testify that she made the sales of morphine that were charged in this case.

A. She did.

130 Mr. Bandy: We object to that question because the testimony of this witness develops a different situation than that included in the impeaching question, the impeaching question having been, did you in the presence of Mr. Howard and Mr. Peterson say to Mr. Dillie. The witness now states that Mr. Peterson was not present.

The Court: The question and answer are important things. Objection overruled.

To which ruling of the court the defendant then and there excepted.

I was present in the United States Attorney's office
131 yesterday when Mrs. Walker and Mr. Peterson were there. Margaret Walker said that she would like to be a government witness. She said that all she had to do with this case was to get $10.00 from Ella Rush for introducing her to Harry Lang.

Cross-Examination.

132 Mrs. Walker did not say that she wasn't guilty.

BERNARD PETERSON, testified as follows:

Direct Examination.

133 I am the same Mr. Peterson that testified before in this case. I was present in the office of the United States Attorney yesterday at the time Margaret Walker was present. She said that she would like to testify for
37 the Government in this case but that she would want to know what would be done to her before she testified. She said all she had to do with the case was to get $10.00 from Ella Rush for introducing her to Harry Lang.

Cross-Examination.

134 I never heard her say that she wasn't guilty.

DEFENDANT'S EVIDENCE IN REBUTTAL.

135 GEORGE BLOCKBURGER, testified as follows:

Direct Examination.

My name is George Blockburger. I live at Granite City, Illinois. I am a real estate broker. I am a brother of the defendant, Harry Blockburger. I was present in the court room yesterday when Mrs. Walker testified.
135 I never requested Margaret Walker to go on the witness stand and testify that she made the sale or sales in this case and that Harry Blockburger didn't. I never talked to her at any time about this case.

Cross-Examination.

136 I live in Granite City. I sign a few bonds. I am on the bond of Mrs. Walker.
137 Q. Are you on the bond of a man named Bapple, who is charged with the violation of the narcotic law in this court?

Mr. Bandy: We object as being wholly immaterially and not proper cross-examination.

The Court: Let him answer.

To which ruling of the court the defendant then and there objected.

A. Yes, sir, I am on the bond of Mr. Bapple.

Mr. Bandy: We further object because of the prejudicial quality of this question. Yesterday Mr. Blockburger was asked whether he knew William Bapple and now the District Attorney injects into the evidence the fact that William Bapple is under indictment for a violation of the same act under which the defendant Harry Blockburger is being tried.

140 38 The Court: Objection overruled.

To which ruling of the court the defendant then and there excepted.

A. Yes, sir.

Mr. Bandy: The defendant asks that the answer be stricken and the jury instructed to disregard it, because it is immaterial, irrelevant and not applicable to the issues in this case.

The Court: Motion denied.

This Was All of the Evidence Introduced in This Cause on Behalf of the Government and the Defendant.

141 Mr. Bandy: And now at the conclusion of the whole case, the defendant, Harry Blockburger asks the court to instruct the jury to find him not guilty on each and every count of the indictment.

The Court: Motion denied.

To which ruling of the court the defendant then and there excepted.

During the course of the closing argument of Mr. Alexander the following transpired in the presence and hearing of the jury:

I am an officer of the Government and the Court is an officer of the Government, and we know Ella Rush.

Mr. Bandy: The defendants object to the statement that Ella Rush is known to this Court, and we ask that the jury be instructed to disregard that statement.

The Court: The jury is instructed to disregard the statement, except that the Court has seen her here and has seen the circumstances under which she comes here.

Mr. Bandy: It wasn't limited to that.

Mr. Alexander: That is just what I means.

* * * * * *

142 39 Mr. Alexander: Most of these narcotic addicts are pickpockets, or a great many of them; we will admit that.

Mr. Bandy: We object to that.

The Court: Well, that may be stricken and disregarded.

Mr. Alexander: If I said anything improper as to that I withdraw it; I didn't mean to say anything of that kind.

Mr. Bandy: I take it nobody is on trial for being a pickpocket.

The Court: Nobody is on trial here for being a pickpocket. Proceed.

* * * * * *

Mr. Alexander: He made deliveries of morphine to her—

Mr. Baker: I submit that is wrong. We denied specifically that we went up to make a delivery of medicine.

Mr. Alexander: Well, he delivered morphine; he admits that he went to her hotel room.

Mr. Baker: But he denied it emphatically.

The Court: I don't recall it; let the jury decide.

Mr. Alexander: As I recall it, Mr. Blockburger in one statement said he went to the hotel room of this woman. I may be worng, but I think that is right.

* * * * * * *

Mr. Alexander: Here is a pickpocket, and he wasn't
142 shocked at that; that is the kind of people that they associated with.

Mr. Bandy: That is objected to; it is an intimation those are the people the defendant associated with. If the Court please, he says that is the kind of people these men associated with.

Mr. Alexander: I think it is a fair inference.

14[illegible]40 The Court: The jury will understand that this is Mr. Alexander's conclusion from the evidence.

* * * * * * *

Mr. Alexander: He met these people on the street at night and learned he was a pickpocket, and he promptly went to the police and reported it.

Mr. Baker: I object to that; Ella Rush swears that he sold to her the next day.

The Court: What?

Mr. Baker: We object to that, Your Honor. After the night at the carnival she testified and swore that he sold to her on the 29th.

Mr. Alexander: I asked him very particularly when he talked to the police, and it was on Thursday,—that was his answer, and I submit that he answered that on Thursday he went to the police.

Mr. Baker: He went to the carnival on the night of Tuesday and found out she was lying to him.

The Court: Let the Jury decide that.

41 COURT'S INSTRUCTIONS.

144 The Court: Gentlemen of the Jury, the Court will not attempt to read the statute of the United States to you with reference to the handling of narcotics, but I will say this to you: that if the defendants have done the things with which they are charged in this indictment in manner and form as charged, they have violated the law.

The first count of this indictment charges the defendants with selling two grains of morphine hydrochloride to one Ella Rush on the 27th day of May 1929, and charging that the morphine in question was not then and there in the original stamped package or sold from the original stamped package.

In regulating the lawful handling of narcotics the law requires that any sale that is made must be made from a stamped package, that is, a package stamped with the revenue stamp showing that the Government has collected the revenue upon that package.

The second count charges that a sale was made under the same unlawful circumstances to Ella Rush on the 28th day of May, 1929, and that the morphine hydrochloride was not then and there in the original stamped package and from the original stamped package.

145 The third count is a similar charge, charging that the sale was made on the 29th day of May, 1929, in the City of Springfield, etc., and the amount was eight grains, about eight grains of morphine hydrochloride to Ella Rush, and that it was sold not from an original stamped package.

The fourth count charges that the defendants wilfully and unlawfully did receive, conceal, buy, sell and facilitate the transportation and concealment and sale of certain narcotic drugs, to-wit, a certain derivative of opium,
42 to-wit, twenty grains of morphine hydrochloride, which said twenty grains of morphine hydrochloride had theretofore been fraudulently imported into the United States contrary to law; that the said Harry Blockburger, alias, etc., and Margaret Walker, at the time of so receiving, buying and facilitating the transportation and concealment, and sale of said twenty grains of morphine hydrochloride, as aforesaid, at the City of Springfield, aforesaid, then and there well knew the same to have been fraudulently imported and brought into the United States.

Where the possession is established, the law presumes that they knew; but the presumption, of course, may be rebutted by the defendants. But unless it is rebutted, the presumption controls.

146 The fifth count charges a sale to Ella Rush of ten grains of morphine hydrochloride on the 29th day of May.

Mr. Alexander: I think that is without giving a written order, Your Honor.

The Court: Yes; without having a written order. That is another requirement of the law, that any person who sells or buys must present a written order which is furnished by the Collector of Internal Revenue. So that is the fifth count.

Now, as you are aware, the Government has nollied the second, third, fourth and fifth counts as to the defendant, Margaret Walker, so that she is on trial as to the first count only. All of the counts stand so far as the defendant Blockburger is concerned. So that the Court will say to you, as a matter of law, that if the defendants have done the things in manner and form as charged in this indictment, they have violated the law.

43 To this indictment the defendants have heretofore entered their several pleas of not guilty. The effect of that plea is to cast the burden upon the Government to prove that the defendants are guilty in manner and form as charged beyond a reasonable doubt. If the Government sustains that burden, and you should so find from
147 the evidence admitted for your consideration, then you would be warranted in finding the defendants guilty. If the Government has not sustained that burden, then it would be your duty to find the defendants or either of them or both of them as the case may be, not guilty.

Gentlemen of the Jury, you will begin the consideration of this case by giving the defendants and each of them the benefit of the presumption of innocence. They are presumed to be innocent throughout the trial, and that presumption is to find effect in a verdict of not guilty unless you find from the evidence that the Government has sustained the burden of proof and proved that the defendants are guilty in manner and form as charged, beyond a reasonable doubt. Then proof to that extent overcomes the presumption of innocence.

Gentlemen of the jury, while it is your duty to take the law as the Court gives it to you as applicable to this case, you are the sole judges of the facts. You are the judges of the credibility of the several witnesses who have testified before you and you are the judges of the weight of the testimony admitted for your consideration. In determining the degree of credibility that you will accord to any witness who has testified before you, you have a

149 right to take into consideration the manner of the witness while testifying, the reasonableness or the unreasonableness, if any, of his story, the truthfulness, if any, of the witness who has testified before you, the opportunities the witness may have had for learning the facts con-
44 cerning which he has testified, and the interest or lack of interest of the witness in the final determination of the case. And then by applying these tests you say for yourselves just what degree of credibility you will accord to a witness and just what weight you will give to his testimony, and make up your verdict accordingly.

Each of these defendants has seen fit to go upon the witness stand and testify in his own behalf. It was their legal right to do so, and it is your duty in determining the degree of credibility that you will accord to them as witnesses for themselves to apply to them the same tests that you apply to any other witness who has testified before you, bearing in mind of course, that the defendants are materially interested in the final determination of this case.

You have heard much in this charge and throughout the trial concerning the presumption of innocence and reason-
149 able doubt. I think the presumption of innocence has been explained to you. Reasonable doubt, Gentlemen of the Jury, means just such a doubt as the expression itself describes, a reasonable doubt, based upon the evidence or lack of evidence in the case,—such a doubt as would cause an ordinarily prudent person to hesitate or pause in the transaction of the grave affairs of life, such as affairs connected with one's business of with one's family. If you have such a doubt as to the guilt of these defendants or either of them, then it is your duty to give them the benefit of that doubt.

On the other hand, a reasonable doubt is not a device that has been concocted to allow guilty men to escape; it does not mean the possibility of a doubt, nor the probability of a doubt, nor a mere speculative doubt; but it means a real, substantial doubt, based upon the evidence or lack of evidence in the case.

45 Gentlemen of the Jury, there is a sharp conflict in the testimony here as to the sales. On one side there is a statement that the purchase was made and on the other side there is a denial that the purchase was made. Therefore you are instructed that if you believe from the

evidence that any witness has wilfully sworn falsely to any fact material to the issues in this case, then you have
150 a right to entirely disregard the testimony of such witness except insofar as it is corroborated by other credible witnesses whom you do believe or by facts and circumstances shown upon the trial.

I told you that you are the judges of the credibility of the witnesses and of the weight of the evidence. The defendant Blockburger saw fit to go upon the witness stand in his own behalf. You were entitled to know who he was. On cross-examination the Government proved by him that he had heretofore been convicted of a felony and had been an inmate of the Missouri State Penitentiary. That evidence was permitted to be submitted to the jury as a fact concerning that witness in order that you might consider it in connection with his credibility as a witness, and that is the only purpose for which it was admitted.

There was a rule at one time that one who had been convicted of a felony was an incompetent witness. That is not the rule now, but he is a competent witness and the jury has a right to take the fact of a former conviction into consideration in determining the degree of credibility they will accord to him as a witness, and, if you believe him, to act upon his testimony.

Gentlemen of the Jury, when you retire to your Jury room you will be permitted to take with you the indictment
151 in this case. The indictment is permitted to go to the jury for one purpose and for one purpose only; and that is that you may accurately inform yourselves as to the exact nature and character of the several charges which are laid against these defendants,—that is, the de-
46 fendant Blockburger and one charge that is made against the defendant Walker. The indictment is not evidence and will not be considered as evidence by you; it is the naked charge, the mere written allegation upon which the issues of fact are raised which you are to try.

Is there any suggestion on behalf of the Government?

Mr. Alexander: I think of no suggestions, Your Honor.

The Court: Are there any suggestions on behalf of the defendants, or either of them?

Mr. Bandy: Merely, cour Honor, to enlarge upon Your Honor's definition of the indictment, by advising the jury that in addition to being the naked frame of the issue, that it is the accusation that imposes upon the prosecu-

tion of the burden of provits its contents beyond a reasonable doubt.

The Court: I thought I made that clear, Mr. Bandy.

Mr. Bandy: Well, possibly so. I just wondered if they understood it was an accusation from the use of the
152 words "that it is the naked charge" or the use of the word "allegation".

The Court: I think the jury is well advised that the indictment is the written accusation, every material allegation of which is put in issue by the plea of not guilty.

Mr. Bandy: No further suggestions.

The Court: No further suggestions?

Mr. Baker: Yes, sir; I would like to have the Court instruct the jury that if they read in the Springfield morning paper or any other periodical anything concerning this case, that they should not allow themselves to be influenced by that in any degree.

47 The Court: The jury will consider itself so instructed. If any of you have read anything in any newspaper concerning this trial, absolutely disregard it, because these defendants must be tried upon the evidence admitted here for your consideration regardless of any reporter's views or anybody else's, or anything else.

Mr. Baker: And that the number of witnesses does not determine the weight of the evidence.

The Court: The jury is so instructed. Are there any exceptions to the charge as given, on behalf of the Government?

Mr. Alexander: No, your Honor.

The Court: Are there any exceptions on behalf of the
153 defendants, or either of them?

Mr. Bandy: The defendants except to the statement contained in that part of the charge referring to the testimony brought out in cross-examination of the defendant Harry Blockburger that he had been convicted and confined in the penitentiary, that there was once a rule of law that one who had been convicted of a felony was an incompetent witness, the application being that that in an unreasonable way and inferentially disparages his testimony at this time, that limitation against his testimony having been removed by statute, and we except to it.

The Court: The jury will disregard the reference in the charge to the law as it formerly stood with reference to the incompetency of a witness convicted of a felony.

Mr. Bandy: That is the only exception.
The Court: Anything else?
Mr. Bandy: That is all.
Mr. Baker: No, sir.
The Court: Gentlemen of the Jury, as to the form of your verdict, if you find both of these defendants guilty, you will say "We, the jury, find the defendants",
48 writing in their names, "guilty"; sign your verdict and return it into court.
154 Now, I will say to the jury that a verdict of guilty as to both in a general verdict will be construed by the Court to be a verdict that the defendant Walker is guilty on the first count only, but to save you writing that in,—that is the only count against her here,—a general verdict of guilty will be considered a general verdict on all five counts as to Blockburger.

If you find both of the defendants not guilty you will say: "We, the jury, find the defendants" naming them "not guilty". Sign your verdict and return it into court. If you find one of the defendants guilty and the other defendant not guilty you will say by your verdict: "We, the jury, find the defendant", writing in the name, "guilty; and the defendant" writing in the other name, "not guilty". If you should find the defendant Blockburger guilty on some count or counts and not guilty on the other count or counts, you will say so by your verdict in a form which I am going to submit to you. If you should find the defendant Walker guilty I think you better write that into this form, and then if you should find the defendant Blockburger guilty on some count or counts and not guilty on other count or counts, you can write that in, so that it will be clear and so that the Court will understand just what you find.

I am giving you these forms for your assistance, not
155 for your direction. Whatever verdict you arrive at must be your verdict, and the verdict that you return must show just what you find.

49 IN THE DISTRICT COURT OF THE UNITED STATES

For the Southern District of Illinois

Southern Division.

United States of America,
Plaintiff,
vs.
Harry Blockburger,
Defendant.
No. 1386.

MOTION FOR NEW TRIAL.

Now comes Harry Blockburger, the above named defendant, by F. O. R. Baker and H. J. Bandy, his attorneys, and respectfully asks the Court to set aside the verdict heretofore rendered in this cause and to grant a new trial therein. As reasons in support of this motion the defendant sets forth the following:

1. The verdict is contrary to the law.
2. The verdict is contrary to the evidence.
3. The evidence does not establish the guilt of the defendant beyond a reasonable doubt.
4. The Court erred in instructing the jury that there was once a rule in law that one who had been convicted of a felony is an incompetent witness in his own behalf.

50 5. The Court erred in permitting the prosecution to show, in the cross examination of the defendant, that he had once been convicted of a felony and incarcerated in the Missouri State Penitentiary. This was not the proper way in which to make such a showing, and it resulted to the prejudice of this defendant.

6. The Court erred in permitting testimony, over the objection of this defendant, concerning statements alleged to have been made by defendant, Margaret Walker, to various narcotic agents, to the effect that she was willing to turn Government witness if the Government would be easy with her, and that she was willing to testify against this defendant; also, testimony to the effect that the defendant, Margaret Walker, stated to narcotic agents that a brother of this defendant, to-wit, George Blockburger, had requested her to testify that she made the sales, in order that this defendant might escape punishment. This testimony was in-

admissible against this defendant, was not binding upon him, but was very prejudicial to his rights. Although it was alleged conversation of the defendant, Margaret Walker, it did not concern her, and concerned only this defendant, in whose presence it was not made.

7. The Court erred in permitting the prosecution, in the cross examination of witness George Blockburger, to
51 ask him if he had not signed the bond of William Bapple, who is under indictment, charged with violating the Harrison Narcotic Law. The defendant had already been asked in cross examination, over objection, whether he was not acquainted with, and did not associate with, William Bapple. The question asked of the witness, George Blockburger, was harmful, improper and prejudicial, because it tended to embarrass and degrade the witness, and to lessen the effect of his testimony, but it was doubly prejudicial, when considered in connection with the improper question asked the defendant in cross examination, concerning his association with William Bapple, because it introduced the said William Bapple to the jury as one charged with the identical offense for which this defendant was being tried.

8. The Court erred in permitting the prosecution over the objections of this defendant, to ask the defendant, in cross examination, if he did not know and associate with William Bapple, with one Walker, and with one Hemstreet, known as "Lion Tamer", and if he did not know them as drug addicts. This testimony was incompetent, irrelevant, immaterial, met no issue raised by the pleadings, but had the effect of prejudicing and embarrassing the defendant with the jury.

52 9. The defendant was unduly and improperly prejudiced by certain remarks of the District Attorney in his closing argument, especially the statement that the Court was acquainted with Ella Rush, principal witness for the prosecution, and also the statement that most persons engaged in the sale of narcotics and most drug addicts are pick pockets, and that this accounts for the fact that the defendant did not report to the police that narcotic agent Peterson had been introduced to him as a pickpocket.

10. The testimony of Ella Rush in unworthy of belief.

11. And for other good and sufficient reasons.

BAKER.
H. J. BANDY,
Attorneys for Defendant.

(But the Court, having duly considered said motion for new Trial, denied the same, and entered judgment upon the verdict. To which ruling of the Court and entry of Judgment, the defendant, by his counsel, then and there excepted.)

53 * * (Caption) * *

MOTION TO VACATE OR MODIFY JUDGMENT.

Now comes Harry Blockburger, the above named defendant, by F. O. R. Baker and H. J. Bandy, his attorneys, and respectfully asks this Honorable Court to vacate or modify the judgment heretofore entered in this cause, and as reasons in support of this motion, the defendant alleges the following:

1. That the sentence imposed is unreasonable and excessive.

2. That the sentence imposed should not exceed a fine of two thousand dollars ($2,000.00) and a sentence of five (5) years in the penitentiary, this being the maximum provided by law.

3. That the sentence imposed is in excess of that provided by law.

F. O. R. Baker
H. J. Bandy
Attorneys for Defendant.

54 But the court having duly considered said motion to vacate and modify judgment, denied the same; to which ruling of the court, the defendant, by his counsel, then and there duly excepted.

And Now, in furtherance of justice and that right may be done, and forasmuch as the matters and things herein set forth do not otherwise appear of record, the defendant tenders and persents the foregoing as his bill of exceptions in the above entitled cause and prays that the same may be allowed, settled and signed and sealed by the court and that the same be made a part of the record, which is accordingly allowed and approved and the same ordered to be filed and made a part of the record in this cause.

Given under the hand and seal of the Judge of said court

before whom said proceedings were had on this 16th day of May, A. D. 1930.

LOUIS FITZHENRY,
Judge of the District Court of the United States for the Southern District of Illinois, Southern Division.

Approved:
WALTER M. PROVINE,
United States Attorney.

Attorneys for the Defendants.

Filed May 16, 1930 S. T. Burnett, Clerk.

55 And afterwards, to wit: on the 19th day of August A. D. 1929, the following further proceedings were had in said court in said case and were entered of record, to wit: Entered 19, 192

56 * * (Caption) * *

ORDER FOR EXTENSION OF TIME IN WHICH TO FILE BILL OF EXCEPTIONS.

It is hereby ordered that Harry Blockburger, the above named defendant, may have thirty (30) additional days, from the 19th day of August, A. D. 1929, or until the 18th day of September, A. D. 1929, in which to file his bill of exceptions in the above entitled cause.

Dated this 18th day of August, A. D. 1929.,

LOUIS FITZHENRY,
Judge of the United States District Court for the Southern District of Illinois.

Endorsed: Filed Aug. 19, 1929, S. T. Burnett, Clerk.

(Endorsed) #1479 In the District Court of the United States for the Southern District of Illinois Southern Division United States of America, Plaintiff, vs. Harry Blockburger, Defendant. Filed Aug. 19 1929 at ..... o'clock ..... M. S. T. Burnett, Clerk Docket #..... Order for Extension of Time in Which to File Bill of Exceptions. H. J. Bandy, Attorney for Defendant.

Sept. 1929. 57 And afterwards, to wit: on the 17th day of September A. D. 1929, the following further proceedings were had in said court in said case and were entered of record, to wit:

58 • • (Caption) • •

ORDER FOR EXTENSION OF TIME IN WHICH TO FILE BILL OF EXCEPTIONS.

It is hereby ordered that Harry Blockburger, the above named defendant, shall have an extension of thirty (30) additional days in which to file his bill of exceptions in the above entitled cause with the clerk of this court, and it is further ordered that said bill of exceptions must be filed on or before October 17th, A. D. 1929.

Dated this 17 day of September, A. D. 1929.

LOUIS FITZHENRY
Judge of the United States District Court of the Southern District of Illinois.

Endorsed: Filed Sept. 17, 1929, S. T. Burnett, Clerk.

Oct. 17. 58½ And afterwards, to wit: on the 17th day of October A. D. 1929, the following further proceedings were had in said court in said case and were entered of record, to wit:

59 • • (Caption) • •

ORDER EXTENDING TIME IN WHICH TO PREPARE AND FILE BILL OF EXCEPTIONS.

Comes now the defendant in the above entitled case by H. J. Bandy, Esq., his attorney and on his motion, it is ordered by the court that the time for preparing and filing the bill of exceptions herein by said defendant, be, and the same is hereby extended for a period of thirty days from and after October 17th, A. D. 1929, to and including November 16th, A. D. 1929.

Dated this 17th day of October, A. D. 1929.

Enter

FITZHENRY
U. S. District Judge.

Endorsed: Filed Oct. 17, 1929, S. T. Burnett, Clerk.

60 And afterwards, to wit: on the 19th day of October A. D. 1929, the following further proceedings were had in said court in said case and were entered of record, to wit: Entered 1929.

61 * * (Caption) * *

Saturday, October 19, 1929.

Court met pursuant to Adjournment.

Present, the Honorable Louis FitzHenry, Judge.

And now on this 19th day of October, A. D. 1929, comes the United States, the plaintiff in this case by Walter M. Provine, Esq., United States Attorney for the Southern District of Illinois and comes also the defendant Harry Blockburger, by H. J. Bandy, Esq., his attorney and the court having heard the arguments of said attorneys on the motion of the said defendant to vacate or to modify the judgment and sentence of the court heretofore pronounced herein and being now fully advised in the premises, it is ordered that said motion be, and is hereby denied, to which ruling of the court the defendant then and there by his attorney duly excepted.

It is further ordered by the court that the said defendant have thirty days in which to prepare and file his bill of exceptions herein.

61½ And afterwards, to wit: on the 19th day of October, A. D. 1929, there was field in the office of the clerk of said court, a certain notice of appeal together with petition for appeal and assignment of errors, which said notice of appeal, petition for appeal and assignment of errors are in the words and figures, following, to wit: Filed O 1929.

62 * * (Caption) * *

NOTICE TO UNITED STATES ATTORNEY OF APPLICATION FOR APPEAL.

To Honorable Walter Provine, United States Attorney for the Southern District of Illinois:—

Please take notice that on Saturday morning, October 19th, A. D. 1929, at the hour of ten o'clock, or as soon thereafter

as same may be heard, application will be made to the Honorable Louis FitzHenry, Judge of the United States Court for the Southern District of Illinois, for an appeal from the judgment of this Court in the above entitled case to the United States Circuit Court of Appeals, for the Seventh Judicial Circuit.

This defendant attaches hereto a copy of the assignment of errors, which will be filed with the said application for appeal, and presented to the Court:

HARRY BLOCKBURGER,
Defendant.
By H. J. BANDY,
Attorney for Defendant.

Copy of foregoing notice, together with copy of assignment of Errors received this 19th day of October, A. D. 1929.

WALTER M. PROVINE,
U. S. Attorney.

63 * * (Caption) * *

H. J. BANDY, first being duly sworn, on his oath states that he is the attorney for the above named defendant, Harry Blockburger.

Affiant further states that on this 18th day of October, A. D. 1929, he mailed a notice of application for the appeal of the above entitled case, together with a copy of the assignment of erorrs, to Honorable Walter Provine, United States Attorney for the Southern District of Illinois, to the office of said Mr. Provine, at Springfield, Illinois.

H. J. BANDY.

Subscribed and sworn to before me this 18th day of October, A. D. 1929.

.....
Notary Public.

Endorsed: Filed Oct. 19, 1929, S. T. Burnett, Clerk.

64 * * (Caption) * *

PRAYER FOR APPEAL.

Now comes Harry Blockburger, the above named defendant, by H. J. Bandy, his attorney, and respectfully prays this Honorable Court to allow an appeal from the judgment in the above entitled cause to the United States Circuit Court of Appeals for the Seventh Judicial Circuit. The said defendant attaches hereto his assignment of errors, together with the affidavit of H. J. Bandy, attorney for defendant, that a copy of said assignment of errors and a notice of this application for appeal have been mailed to Honorable Walter Provine, United States Attorney for the Southern District of Illinois, at Springfield, Illinois.

HARRY BLOCKBURGER
Defendant.
By: H. J. BANDY
Attorney for Defendant.

Endorsed: Filed Oct. 19, 1929, S. T. Burnett, Clerk.

65 * * (Caption) * *

ASSIGNMENT OF ERRORS.

And now comes the defendant, Harry Blockburger, by H. J. Bandy, his attorney, and says that there is manifest error in the record and proceedings in this case, in this:—

1. The Court erred in imposing an excessive and unreasonable punishment.
2. The Court erred in instructing the jury that there was once a rule of law that one who had been convicted of a felony is an incompetent witness in his own behalf.
3. The Court erred in permitting the prosecution to show, in the cross-examination of the defendant, that he had once been convicted of a felony and incarcerated in the Missouri State Penitentiary.
4. The Court erred in permitting testimony, over the objection of this defendant, concerning statements alleged to have been made by co-defendant, Margaret Walker, who was found not guilty, to various United States narcotic agents,

to the effect that she was willing to turn Government witness, if the Government would be easy with her, and that she
66 was willing to testify against this defendant; also, in admitting testimony, over the objection of the defendant, to the effect that the co-defendant, Margaret Walker, stated to narcotic agents that a brother of this defendant, to-wit, George Blockburger, had requested her to testify that she made the sales of narcotics, in order that this defendant might escape punishment.

5. The Court erred in permitting the prosecution, in the cross examination of witness George Blockburger, to prejudice the said witness with the jury, by asking him if he had not signed the bond of William Bapple, who is under indictment in this Court, charged with violating the Harrison Narcotic Law.

6. The Court erred in permitting the prosecution, over the objections of this defendant, to ask the defendant, in cross examination, if he did not know and associate with William Bapple, with one Walker, and with one Hemstreet, known as "Lion Tamer."

7. The defendant was unduly and improperly prejudiced by certain remarks of the United States Attorney, in his closing argument, especially the statement that the Court was acquainted with Ella Rush, principal witness for the prosecution, and also the statement that most persons engaged in the sale of narcotics, and most drug addicts, are pickpockets.

8. The Court erred in denying defendant's request for a directed verdict of not guilty, or an instruction directing the jury to find the defendant not guilty, made at the close of the Government's case, and renewed at the close of all of the evidence in the case.

HARRY BLOCKBURGER
Defendant.
By H. J. BANDY
Attorney for Defendant.

Filed Oct. 19, 1929 S. T. Burnett, Clerk.

(Endorsed) No 1479. United States of America, —vs— Harry Blockburger, alias, etc. Assignment of Errors. Filed Oct. 19, 1929. S. T. Burnett, Clerk.

67 And afterwards, to wit: on the 19th day of October A. D. 1929, the following further proceedings were had in said court in said case and were entered of record, to wit: Entered O 1929.

68 * * (Caption) * *

APPEAL ORDER.

And now comes Harry Blockburger, the defendant in the above entitled cause, and prays an appeal from the judgment of the District Court of the United States for the Southern District of Illinois, in the case of United States vs. Harry Blockburger, wherein the said Blockburger was charged, in an indictment, and impleaded with a co-defendant, whose name is Margaret Walker, with having violated various provisions of the act of Congress, approved December 17th, A. D. 1914, as amended, commonly known as the Harrison Narcotic Act, and also the violation of the act of Congress of February 9th, A. D. 1909, as amended, commonly known as the Narcotic Drugs Import and Export Act, and the said Harry Blockburger now files his assignment of errors, which is hereto attached, together with the affidavit of H. J. Bandy, his attorney, showing that a copy of said assignment of errors and a notice that this application for appeal will be made by Harry Blockburger, has been mailed to Honorable Walter Provine, United States Attorney for the Southern District of Illinois.

And upon consideration of such application for appeal,
69 it is ordered and adjudged by the Court that an appeal be allowed to the said defendant, Harry Blockburger, the said appeal to be to the United States Circuit Court of Appeals for the Seventh Judicial Circuit.

Dated this 19th day of October, A. D. 1929.

LOUIS FITZHENRY
Judge of the United States Court for the Southern District of Illinois.

Endorsed: Filed Oct. 19, 1929, S. T. Burnett, Clerk.

(Endorsed) In the District Court of the United States for the Southern District of Illinois Southern Division. United States of America, Plaintiff, vs. Harry Blockburger, Defendant. (Copy) H. J. Bandy, Attorney for Defendant.

Nov. 19. 70 And afterwards, to wit: on the 19th day of November A. D. 1929, the following further proceedings were had in said court, in said case and were entered of record, to wit:

71 * * (Caption) * * *

INDICTMENT.

This cause coming on this day to be heard upon the motion of the defendant herein for additional time within which to prepare and file his Bill of Exceptions herein and it appearing to the Court that said defendant has been unable to present same to the court for approval, it is ordered that the time for preparing and filing the said Bill of Exceptions be, and the same is hereby extended for a period of thirty days from and after this date, to and including December 18, 1929.

Dated this 18 day of November, A. D. 1929.

Enter

FITZHENRY
U. S. District Judge.

Endorsed: Filed Nov. 19, 1929, S. T. Burnett, Clerk.

Nov. 19. 72 And afterwards, to wit: on the 19th day of November A. D. 1929, the following further proceedings were had in said court, in said case and were entered of record, to wit:

73 * * (Caption) * * *

INDICTMENT.

This cause coming on this day to be heard upon the motion of the defendant herein for an enlargement of the time within which to file the transcript of record herein in the United States Circuit Court of Appeals for the Seventh Circuit and for the docketing of said cause in said court and for good cause shown, it is ordered by the court that the time for filing said transcript of record and docketing said cause in the said United States Circuit Court of Appeals for the Seventh Circuit be, and the same is hereby extended for

a period of thirty days from and after this date, to and including December 18, 1929.

Dated this 18th day of November, A. D. 1929.

Enter

FITZHENRY
U. S. District Judge.

Endorsed: Filed Nov. 19, 1929, S. T. Burnett, Clerk.

Entered 1929.

And afterwards, to wit: on the 18th day of December A. D. 1929, the following further proceedings were had in said court, in said case and were entered of record, to wit:

74 * * (Caption) * *

INDICTMENT.

This cause coming on this day to be heard upon the motion of the defendant herein for additioal time within which to prepare and filed his bill of Exceptions herein, and it appearing to the Court that said defendant has been unable to present same to the Court for approval, it is ordered that the time for preparing and filing the said Bill of Exceptions be, and the same is hereby extended for a period of thirty days from and after this date, to and including January 17, 1930.

Enter:

FITZHENRY
U. S. District Judge.

Dated this 18th day of December, A. D. 1929.

Endorsed: Filed Dec. 18, 1929, S. T. Burnett, Clerk.

75 And afterwards, to wit: on the 18th day of December A. D. 1929, the following further proceedings were had in said court, in said case and were entered of record, to wit:

Dec. 18, 76 * * (Caption) * *

INDICTMENT.

This cause coming on this day to be heard upon the motion of the defendant herein for an enlargement of the time within which to file the transcript of record herein in the United States Circuit Court of Appeals for the Seventh Circuit and for the docketing of said cause in said court, and for good cause shown, it is ordered by the Court that the time for filing said transcript of record and docketing said cause in the said United States Circuit Court of Appeals for the Seventh Circuit be, and the same is hereby extended for a period of thirty days from and after this date, to and including January 17, 1930.

Enter:

FITZHENRY
U. S. District Judge.

Dated this 18th day of December, A. D. 1929.

Endorsed: Filed Dec. 18, 1929, S. T. Burnett, Clerk.

13. 77 And afterwards, to wit: on the 13th day of January A. D. 1930, the following further proceedings were had in said court in said case and were entered of record, to wit:

78 * * (Caption) * *

MOTION FOR EXTENSION OF TIME.

Now comes Harry Blockburger, the above named defendant, by H. J. Bandy, his attorney, and respectfully asks this Honorable Court to enter an order extending the time for preparing and filing his bill of exceptions herein, and for filing the transcript of record and docketing said cause in the United States Circuit Court of Appeals for the Seventh Circuit, for a period of thirty days from January 17th, A. D. 1930, which would be to and including February 16th, A. D. 1930.

H. J. BANDY
Attorney for Appellant.

79 * * (Caption) * * Entered J 1930.

ORDER FOR EXTENSION OF TIME.

And now, on this 13th day of January, A. D. 1930, comes the above named defendant, by H. J. Bandy, his attorney, and on his motion it is ordered by the Court that the time for preparing and filing his bill of exceptions herein, and for filing the transcript of record and docketing said cause in the United States Circuit Court of Appeals for the Seventh Circuit be, and they are each hereby extended for a period of thirty days from the 17th day of January, A. D. 1930, to and including February 16th, A. D. 1930.

FITZHENRY
United States Judge.

Endorsed: Filed Jany. 13, 1930, S. T. Burnett, Clerk.

(Endorsed:) In the District Court of the United States for the Southern District of Illinois Southern Division United States of America, Appellee, *v.* Harry Blockburger, Appellant. Motion and order for Extension of time. H. J. Bandy, Attorney for Appellant.

80 And afterwards, to wit: on the 15th day of February A. D. 1930, the following further proceedings were had in said court in said case and were entered of record, to wit: Filed Fe 1930.

81 * * (Caption) * *

MOTION FOR EXTENSION OF TIME.

Now comes Harry Blockburger, the above named defendant, by H. J. Bandy, his attorney, and respectfully asks this Honorable Court to enter an order extending the time for preparing and filing his bill of exceptions herein, and for filing the transcript of record, and docketing said cause in the United States Circuit Court of Appeals for the Seventh Circuit, for a period of ten days from the 16th day of February, A. D. 1930, or to and including February 26th, A. D. 1930.

H. J. BANDY
Attorney for Appellant.

Feb. 15, 82 * * (Caption) * *

ORDER FOR EXTENSION OF TIME.

And now, on this 15th day of February, A. D. 1930, comes the above named defendant, by H. J. Bandy, his attorney, and on his motion, it is ordered by the Court that the time for preparing and filing his bill of exceptions herein, and for filing the transcript of record and docketing said cause in the United States Circuit Court of Appeals for the Seventh Circuit be, and they are each hereby extended for a period of ten days from the 16th day of February, A. D. 1930, to and including the 26th day of February, A. D. 1930.

2/15/30

FITZHENRY
United States Judge.

Endorsed: Filed Feby. 15, 1930. S. T. Burnett Clerk.

b. 26, 83 And afterwards, to wit: on the 26th day of February A. D. 1930, the following further proceedings were had in said court in said case and were entered of record, to wit:

84 * * (Caption) * *

MOTION FOR EXTENSION OF TIME.

Now comes Harry Blockburger, the above named defendant by Harold J. Bandy, his attorney, and respectfully asks this honorable court to grant an extension of thirty days, or until and including the 25th day of March, A. D. 1930, in which to file his bill of exceptions, transcript of the record, and to docket the case in the United States Circuit Court of Appeals for the 7th circuit.

H. J. BANDY
Attorney for Defendant.

Endorsed: Filed February 26, 1930 S. T. Burnett, Clerk.

85 * * (Caption) * * Entered Fe 1930.

ORDER FOR EXTENSION OF TIME.

Harry Blockburger, above named defendant, having asked for an extension of time in which to file his bill of exceptions, transcript of the record and in which to docket the above entitled case in the United States Circuit Court of Appeals, it is hereby ordered, adjudged and decreed that the said defendant may have thirty additional days to and including the 25th day of March, A. D. 1930, in which to file his said bill of exceptions, transcript of the record and to docket his case in the said United States Circuit Court of Appeals.

Dated this 26th day of February, A. D. 1930.

FITZHENRY
United States Judge

Endorsed: Filed Feby. 26, 1930 S. T. Burnett, Clerk.

And afterwards, to wit: on the 25th day of March A. D. 1930, the following further proceedings were had in said court in said case and were entered of record, to wit: Filed Mar 1930.

86 * * (Caption) * *

APPLICATION FOR EXTENSION OF TIME.

Now comes Harry Blockburger, above named defendant, by Keefe, Bandy, and Listeman, his attorneys, and respectfully asks this honorable court to grant an extension of ten days, or until and including the 4th day of April, A. D. 1930, in which to file his Bill of Exceptions, and transcript of the record and docket this cause in the United States Circuit Court of Appeals for the 7th Circuit.

KEEFE, BANDY & LISTEMAN

Endorsed: Filed March 25, 1930 S. T. Burnett, Clerk.

Mar. 25, 87 * * (Caption) * *

ORDER.

Harry Blockburger, the above named defendant, having petitioned for extension of time in which to file his Bill of Exceptions, Transcript of the Record, and to docket this cause upon appeal in the United States Circuit Court of Appeals for the 7th Circuit, and the court being now fully advised in the premises, it is ordered and adjudged that defendant be granted an extension of time until and including the 4th day of April, A. D. 1930, in which to file his Bill of Exceptions, Transcript of the Record, and to dockst this cause upon appeal in the United Ctates Circuit Court of Appeals for the 7th Circuit.

Dated this 25th day of March, A. D. 1930.

LOUIS FITZHENRY.
Judge of the U. S. District Court for the Southern District of Ill.

Endorsed: Filed March 25, 1930 S. T. Burnett, Clerk.

Apr. 4, 88 And afterwards, to wit: on the 4th day of April A. D. 1930, the following further proceedings were had in said court in said case and were entered of record, to wit:

89 * * (Caption) * *

PETITION FOR EXTENSION OF TIME.

Now comes Harry Blockburger, the above named appellant, by H. J. Bandy, his attorney, and respectfully petitions this Honorable Court for an extension of thirty days from the 4th day of April, A. D. 1930, in which to file his bill of exceptions and record in the above entitled cause, and in which to docket the appeal of the above entitled cause in the United States Circuit Court of Appeals, for the Seventh Circuit.

Dated this 4th day of April, A. D. 1930.

H. J. BANDY
Attorney for Appellant.

Entered A
1930.

90 * * (Caption) * *

ORDER FOR EXTENSION OF TIME.

Harry Blockburger, the above named appellant, having petitioned this Honorable Court for an extension of time within which to file his bill of exceptions, and the record, in the above entitled cause, and to docket the appeal of the above-entitled cause in the United States Circuit Court of Appeals, for the Seventh Circuit, and the Court being now fully advised in the premises, it is ordered, adjudged and decreed that the appellant, Harry Blockburger, be granted an additional thirty days from the 4th day of April, A. D. 1930, or until and including the 3rd day of May, A. D. 1930, in which to file his bill of exceptions, and the Clerk's Record, and to docket the appeal of the above entitled cause in the United States Circuit Court of Appeals, for the Seventh Circuit.

Dated this 4th day of April, A. D. 1930.

LOUIS FITZHENRY
Judge of the United States Court For the Southern District of Illinois.

Endorsed: Filed April 4, 1930 S. T. Burnett, Clerk.

Filed Ma
1930.

And afterwards, to wit: on the 3rd day of May A. D. 1930, the following further proceedings were had in said court in said case and were entered of record, to wit:

91 * * (Caption) * *

PETITION FOR EXTENSION OF TIME.

Now comes Harry Blockburger, the above named appellant, by H. J. Bandy, his attorney, and respectfully petitions this Honorable Court for an extension of ten days from the 4th day of May, A. D. 1930, in which to file his bill of exceptions and record in the above entitled cause, and in which to docket the appeal of the above entitled cause in the United States Circuit Court of Appeals, for the Seventh Circuit. As reasons in support of this application, this appellant states that the work of transcribing the bill of exceptions has not yet been completed, and sufficient time will not remain in which

to abstract the bill of exceptions within the time allowed by the order of Court.

Dated this second day of May, A. D. 1930.

H. J. BANDY,
Attorney for Appellant.

Endorsed: Filed May 3, 1930 S. T. Burnett Clerk.

92 * * (Caption) * * *

ORDER FOR EXTENSION OF TIME.

Harry Blockburger, the above named appellant, having petitioned this Honorable Court for an extension of time within which to file his bill of exceptions, and the record, in the above entitled cause, and to docket the appeal of the above entitled cause in the United States Circuit Court of Appeals, for the Seventh Circuit, and the Court being now fully advised in the premises, it is ordered, adjudged and decreed that the appellant, Harry Blockburger, be granted an additional thirty days from the 4th day of May, A. D. 1930, or until and including the 3rd day of June, A. D. 1930, in which to file his bill of exceptions and the Clerk's Record, and to docket the appeal of the above entitled cause in the United States Circuit Court of Appeals, for the Seventh Circuit.

Dated this second day of May, A. D. 1930.

.....

Judge of the United States Court for the Southern District of Illinois.
SAMUEL ALSCHULER
Judge.

O. K.
By WALTER M. PROVINE
U. S. Atty.
JAMES T. DILLIE
Asst. U. S. Atty.

Endorsed: Filed May 2, 1930 S. T. Burnett Clerk.

(Endorsed:) In the District Court of the United States for the Southern District of Illinois, Southern Division. United States of America, Appellee, vs. Harry Blockburger, Appellant. Petition and Order for Extension of Time. H. J. Bandy, Attorney for Appellant.

93 And afterwards, to wit: on the 8th day of January, A. D. 1930, there was filed in the office of the clerk of said court, a certain Praecipe for Record, which said Praecipe for Record was and is in the words and figures, following, to wit: Fil 1

94 * * (Caption) * *

To Honorable S. T. Burnett, Clerk of the United States District Court for the Southern District of Illinois:

You are hereby requested to prepare and file, in the United States Circuit Court of Appeals for the Seventh Circuit, on behalf of Harry Blockburger, above named appellant, a transcript of the record and proceedings in the above entitled cause, wherein the United States of America was plaintiff, and Harry Blockburger was defendant, said transcript of the record to contain a copy of all of the records in said cause on file in your office, and particularly the following:

1. Placita.
2. Indictment.
3. Plea of not guilty.
4. Proceedings of trial.
5. All orders of Court not specifically enumerated herein.
6. Verdict of jury and exceptions thereto.

95 7. Judgment and sentence.

8. Notice of appeal, with assignment of errors attached.
9. Order granting appeal and fixing time for filing bill of exceptions.
10. All orders granting extensions of time for filing bill of exceptions, or for filing transcripts of record, and docketing said cause in United States Circuit Court of Appeals.
11. Citation to United States District Attorney, with service thereon.
12. Bill of exceptions, and approval thereof by the court.
13. Praecipe for record.
14. Clerk's certificate.

H. J. Bandy
Attorney for Appellant.

Endorsed: Filed Jan. 8, 1930, S. T. Burnett, Clerk.

(Endorsed:) * * (Caption) * * Filed Jan 8 1930 at .....o'clock .....M. S. T. Burnett, Clerk H. J. Bandy, Attorney for Appellant.

97 United States of America
Southern District of Illinois } ss.
Southern Division

I, S. T. Burnett, Clerk of the District Court of the United States for the Southern District of Illinois and keeper of the records and seals thereof, do hereby certify the foregoing to be a true and complete transcript of the proceedings had of record and on file in the case entitled The United States —vs— Harry Blockburger, alias Harry Blackburger, Alias Harry Lang, No. 1479, (made in accordance with praecipe for record filed therein) as fully as the same appear from the original files and records thereof now in my office remaining.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at Springfield, in said District, this 19th day of May, A. D. 1930.

S. T. BURNETT,
Clerk.

(Seal)

96 United States of America, } ss.

The President of the United States, To United States of America, Walter M. Provine, United States Attorney for the Southern District of Illinois, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals, for the Seventh Circuit, to be holden at Chicago within thirty days from the date hereof, pursuant to an appeal filed in the Clerk's Office of the District Court of the United States for the Southern District of Illinois, Southern Division, wherein Harry Harry Blockburger, is appellant and you are appellee, to show cause, if any thereby, why the judgment & sentence rendered against the said appellant as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Louis FitzHenry, Judge of the District Court of the United States, this 19th day of October, in the year of our Lord one thousand nine hundred and twenty-nine.

LOUIS FITZHENRY,
U. S. District Judge for the Southern District of Illinois.

Service of the foregoing Citation and receipt of a copy thereof is admitted this 19th day of October, A. D. 1929.

WALTER M. PROVINE
U. S. Attorney.

(Endorsed:) * * Caption * * Citation and service Returnable November 18, 1929 S. T. Burnett, Clerk. Filed October 19th, 1929. S. T. Burnett, Clerk.

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit begun and held in the United States Court Room in the City of Chicago in said Seventh Circuit on the first day of October, 1929, of the October Term in the year of our Lord one thousand nine hundred and twenty-nine, and of our Independence the one hundred and fifty-fourth.

And afterwards, to wit, on the sixth day of June, 1930, there was filed in the office of the clerk of this Court an appearance of counsel for Appellees, which said appearance is in the words and figures following, to wit:

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, OCTOBER TERM, 1929

No. 4389

HARRY BLOCKBURGER, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee

The Clerk will enter my appearance as counsel for the Appellee.

Walter M. Provine, United States Attorney, Federal Building, Springfield, Illinois.

Endorsed: Filed June 6, 1930. Edward M. Holloway, Clerk.

And afterwards, to wit, on the twelfth day of June, 1930, there was filed in the office of the clerk of this Court an appearance of counsel for Appellant, which said appearance is in the words and figures following, to wit:

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, OCTOBER TERM, 1929

No. 4389

HARRY BLOCKBURGER, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee

The Clerk will enter my appearance as counsel for the Appellant.

Harold J. Bandy, Hodge Bldg., Granite City, Ill.

Endorsed: Filed June 12, 1931. Edward M. Holloway, Clerk.

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit begun and held in the United States Court Room in the City of Chicago in said Seventh Circuit on the seventh day of October, 1930, of the October Term in the year of our Lord one thousand nine hundred and thirty, and of our Independence the one hundred and fifty-fifth.

And afterwards, to wit, on the second day of April, 1931, the following further proceedings were had and entered of record, to wit:

Thursday, April 2, 1931.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present: Hon. Samuel Alschuler, Circuit Judge, presiding; Hon. William M. Sparks, Circuit Judge; Edward M. Holloway, Clerk; Henry C. W. Laubenheimer, Marshal.

4389

HARRY BLOCKBURGER

vs.

UNITED STATES OF AMERICA

Appeal from the District Court of the United States for the Southern District of Illinois, Southern Division

It is now here ordered that this cause be, and the same is hereby set down for hearing on Thursday, April 16, 1931.

And afterwards, to wit, on the sixteenth day of April, 1931, the following further proceedings were had and entered of record, to wit:

Thursday, April 16, 1931.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present: Hon. Samuel Alschuler, Circuit Judge, presiding; Hon. Evan A. Evans, Circuit Judge; Hon. William M. Sparks, Circuit Judge; Edward M. Holloway, Clerk; Henry C. W. Laubenheimer, Marshal.

4389

HARRY BLOCKBURGER

vs.

UNITED STATES OF AMERICA

Appeal from the District Court of the United States for the Southern District of Illinois, Southern Division

Now this day come the parties by their counsel and this cause now comes on to be heard on the printed record and briefs of counsel and on oral arguments by Mr. Harold J. Bandy, counsel for appellant, and by Mr. Marks Alexander, counsel for appellee, and the Court having heard the same, takes this matter under advisement.

And afterwards, to wit, on the eleventh day of June, 1931, there was filed in the office of the clerk of this Court, the opinion of the Court, which said Opinion is in the words and figures following, to wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, OCTOBER TERM, 1930, APRIL SESSION, 1931

No. 4389

HARRY BLOCKBURGER, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee

Appeal from the District Court of the United States for the Southern District of Illinois, Southern Division

June 11, 1931

Before Alschuler, Evans, and Sparks, Circuit Judges

SPARKS, Circuit Judge:

Appellant was charged by indictment with having violated what is commonly known as the Harrison Narcotic

Act of 1914, as amended, and also what is commonly known as the Narcotic Drugs Import and Export Act of 1909, as amended. The indictment was in five counts. The first count alleged a sale to Ella Rush on May 27, 1929, of two grains of morphine hydrochloride not in or from an original stamped package. The second count alleged a sale to the same party, on May 28, 1929, of ten grains of the same drug not in or from an original stamped package. The third count alleged a sale to the same party, on May 29, 1929, of eight grains of the same drug not in or from an original stamped package. The fourth count charges appellant with having knowingly received, bought, sold, and facilitated the transportation, concealment and sale, on May 31, 1929, of twenty grains of the same drug, which had been fraudulently imported into the United States. The fifth count alleges a sale to Ella Rush, on May 29, 1929, of ten grains of the same drug, which sale was not in pursuance of a written order of Ella Rush upon a blank form issued for that purpose by the Commissioner of Internal Revenue.

The first, second, and third counts were based upon par. 703, 44 Stat. 96; the fourth count was based on the Act of 1909, par. 2, 35 Stat. 614, as amended in 1914, 1922, and 1924. The fifth count was based on par. 2, 38 Stat. 786. The jury returned a verdict of guilty as to counts two, three and five, and not guilty as to counts one and four. The court assessed a punishment on each of the second, third, and fifth counts of five years' imprisonment and a fine of $2,000, the terms of imprisonment to run consecutively.

It is appellant's contention that the sentence imposed is excessive, unreasonable, and for a longer period of imprisonment and a greater fine than the maximum fixed by law; that the facts proved under counts two, three, and five establish, if anything, but one offense, and that he cannot legally be held guilty of separate offenses; that the maximum punishment for any single violation of the statute in controversy is a fine of $2,000 and imprisonment for five years.

Par. 703, 44 Stat. 96, provides that it shall be unlawful for any person to sell opium or coca leaves, or any compound, manufacture, salt, derivative, or preparation thereof, except in the original stamped package or from

the original stamped package. Counts one and two are drawn under this section. They charge two separate sales, on different days but to the same party, and the evidence supports the charges. There is nothing in the statute to indicate that Congress intended that such a state of facts should be considered as a continuing offense, or that such an offender should suffer but one penalty, or that the aggregate penalties should not exceed the maximum penalty provided for a separate offense. The offenses charged and proved are as separate and distinct as if appellant had sold the drug to different parties on the dates mentioned.

The sale referred to in the third count is the same sale upon which the fifth count is based, but the circumstances under which the sale was made were such as to render the sale illegal for two different reasons, as set forth in and as violative of two separate statutes. In other words, in making one sale appellant violated two separate sections of the law, one of which required the sale to be made in or from the original stamped package, upon which section count three is based, and another section which required the sale to be made in pursuance of a written order of the purchaser upon a blank form issued for that purpose by the Commissioner of Internal Revenue, upon which section the fifth count is based. It cannot be said that the evidence necessary to establish the truth of either of the two counts in controversy would establish the other count, for indeed the opposite is true.

The test of identity of offenses is whether the same evidence is required to sustain them; if not, then the fact that both charges relate to and grow out of one transaction does not make a single offense where two are defined by statute. Morgan v. Devine, 237 U. S. 632.

That distinct violations of law growing out of the same transaction constitute distinct offenses is fully supported by Burton v. United States, 202 U. S. 344, Gavieres v. United States, 220 U. S. 338, Ebeling v. Morgan, 237 U. S. 625, Braden v. United States, 270 Fed. 441, and Roark v. United States, 17 F. (2d) 570. "There is nothing in the Constitution which prevents Congress from punishing separately each step leading to the consummation of a transaction which it has power to prohibit and punishing also the completed transaction." Albrecht v. United States, 273 U. S. 1.

In this case the court imposed upon appellant separate punishments (a) for sale of morphine which was not in the original stamped package or from the original stamped package, (b) for selling on another day morphine not in the original stamped package, and (c) for selling morphine without a written order from the purchaser and without using a form for such order issued by the Commissioner of Internal Revenue.

Our attention has been called to the case of Ballerini v. Aderholt, 44 F. (2d) 352, wherein appellant was charged in one count of the indictment with having sold a narcotic without being registered and without having paid the special tax provided by law; and in the second count with having made the sale without requiring from the purchaser a written order. Upon his plea of guilty the District Court sentenced him on both counts and ordered that the sentences run consecutively. The Circuit Court of Appeals of the Fifth Circuit reversed the District Court and held that there was but one offense, and in so doing it used the following language: "At last it was the sale, and not the failure to register, pay the tax, or secure the written order, that constituted the offense." This we cannot accept as a proper construction of the statute, nor of the Supreme Court decisions, supra. Neither the sale, the failure to register, pay the tax, or secure the written order, in and of itself constitutes a crime; but the sale in conjunction with either the failure to register, pay the tax, or secure the written order does constitute a separate crime as we interpret the statute, and as we think the Supreme Court has interpreted it.

Whether the sentence imposed is unduly severe we are not in position to say accurately. Circumstances not disclosed by the record may justify it, and we cannot disturb the judgment on this account. United States v. Daugherty, 269 U. S. 360.

In instructing the jury upon the competency and credibility of appellant as a witness, the court said:

"There was a rule at one time that one who had been convicted of a felony was an incompetent witness. That is not the rule now, but he is a competent witness and the jury has a right to take the fact of a former conviction into consideration in determining the degree of credibility they

will accord to him as a witness, and, if you believe him, to act upon his testimony."

Appellant insists that the court erred in instructing the jury as to what was formerly the law. There was no prejudicial error in this, and if there had been the court cured it by withdrawing that part of the instruction from the jury.

Appellant contends that the court erred in permitting the District Attorney, in cross-examination, to ask witness George Blockburger if he had not signed a bond of William Bapple, who is under indictment in this court, charged with violating the Harrison Narcotic Law; and that the court further erred in permitting the District Attorney, in cross-examination, to ask appellant if he did not know and associate with William Bapple, with one Walker, and with one Hemstrett, known as Lion Tamer. The court did not abuse its discretion in permitting these questions to be asked and answered, as affecting the credibility of such witnesses.

The question put to George Blockburger was proper for another reason. He had testified that his business was that of real estate broker, and the cross-examination showed that a part of his business was that of going on bonds in criminal cases—not only for Bapple, but for other people. In this respect it related to his direct testimony and was proper.

Appellant further contends that reversible error was committed by the District Attorney in his argument to the jury to the effect that most narcotic addicts are pickpockets. This statement was immediately withdrawn by the District Attorney, and the court admonished the jury that no one was on trial for being a pickpocket. If there was any error in this remark it was cured.

The District Attorney further stated to the jury that "I am an officer of the Government and the Court is an officer of the Government, and we know Ella Rush." Appellant insists that this was error. While the remark was unnecessary, we fail to understand how it could have prejudiced appellant, and the court instructed the jury to disregard it.

We find no error in the record, and the judgment is affirmed.

ALSCHULER, Circuit Judge, dissenting:

The imposition under three counts of one indictment of an aggregate penalty of fifteen years' imprisonment and $6,000 fine, where the maximum penalty for the crime denounced by the statute is five years' imprisonment and $2,000 fine, suggests careful search of the record to see whether such triple maximum is sustainable.

In United States v. Daugherty, 269 U. S. 360, where, as here, there was imposed a penalty of five years' imprisonment under each of three counts charging violation of the Anti-Narcotic Act, it was held that the Court of Appeals was right in denying the contention that the indictment charged but a single crime. From the opinion of the Court of Appeals therein (2 F. (2d) 691) it appears that the first count charged a sale January 4, 1923, to Elmer; the second, January 10 to Entriken; and the third, January 17 to Ellison. The Supreme Court held unsound the contention that each sale proceeded from the same criminal intent and was therefore but a single crime, "because criminal intent is not an element of the crime, and because each count charges a different sale to a different person and on a different day, and if the sales were made as charged they constituted three separate offenses."

But here, accepting at par the evidence for the Government, it seems to me but a single crime appears. Witness Ella Rush, herself an addict, was the keystone of the Government's case. She had been regularly employed by a Federal narcotic agent as a decoy to ferret out persons who were unlawfully selling narcotics. She reported for duty at Springfield and sought out a woman named Walker (a co-defendant), representing that she wished to buy morphine. On the night of May 27, 1929, Walker brought appellant to Rush, who, after various pretenses concerning herself, gave appellant two dollars, requesting him to get her some morphine. He went out and returning a little later brought her the morphine. At the same time she gave him eight dollars more, requesting him to bring her more of the drug. In a few hours he again returned with about ten grains more; and a little later the same day she gave him ten dollars for more morphine, which he brought her the day following. She asked him for more, but he evidently had become suspicious and did not bring it,

whereupon he was arrested. She also paid Walker ten dollars for introducing her to appellant, all the funds being supplied by the narcotic agent.

The situation here is decidedly different from that in the Daugherty case, where the sales were to different persons, and separated by intervals of several days. Here the transactions were between the same parties, and in pursuance of the same definite purpose and plan of the narcotic agent to have this person detected and taken in the act of violating the law. The transactions between appellant and Rush, which are alone the foundation of the charge, show a sort of "continuous performance," Rush supplying him with the Government's money, and employing each delivery of the drug as an immediate leverage for inducing him to procure more of the same. There was substantially no interval of time between the receiving of one and the advancing of the money for the next installment.

I do not question the propriety, in proper cases such as this, of resorting to such means for detecting and punishing crime; but if in the detecting process the Government sees fit to make an installment affair of it, I do not think the Government is in position to say that each installment of such a general operation constitutes a separate crime. The agent conducted the affair with an unbroken continuity, with the motive and plan of adducing proof that this man could and would and did unlawfully procure and sell and deliver narcotic drugs. It was essentially more a buying than a selling transaction. The Government procured it to be done. The sectional nature of the transaction was a device of the agent, not of appellant, who would no doubt have been quite as willing to sell the entire quantity at once instead of on the Federal agent's "installment plan."

Upon the count which involved the two dollar sale appellant was acquitted by the jury. Of the three counts on which he was convicted, counts three and five involved the very same transaction, count three charging that the morphine sold was not in nor from the original stamped package, and count five that the sale was not made in pursuance of a written order of Ella Rush and upon a form issued in blank for that purpose by the Commissioner of Internal Revenue. The incriminating acts of appellant under each of these counts are precisely the same—the

same sale of the same drug, and all pursuant to the same scheme of having appellant caught in the act of selling the drug which appellee's agent was to buy.

That the "bootlegging" of narcotics is a most reprehensible and dastardly business should have no bearing on whether a single unlawful sale may be twice punished—once because the purchaser supplied no written order, and again because there was no stamp on the package.

I do not think the penalty section of the statute contemplates such double punishment for the same transaction. Sec. 705, Title 26, U. S. C., provides:

"Any person who violates or fails to comply with any of the requirements of sections 211 and 691 to 707 of this title shall, on conviction, be fined not more than $2,000 or be imprisoned not more than five years, or both, in the discretion of the court."

It seems to me this wording implies that any act whereby any one or more of the requirements of the enumerated sections is violated shall subject the offender to the singular penalty which the quoted section specifies. Appellant's one act of selling ten grains of morphine subjected him to the prescribed penalty if in the sale he violated or failed to comply with "any of the requirements"—whether one or more. The unlawful sale is the essential thing, not the particular reason or reasons because of which the sale is unlawful. If the seller in making it complies with all the statutory requirements he commits no crime; if he fails to comply with all or any of these requirements a crime is committed, for which the penalty fixed in section 705 may be imposed; but to my mind not a cumulative series of such penalties, each predicated on a different one of the quite numerous requirements of the specified sections.

The quoted sentence, from Albrecht v. United States, 273 U. S. 1, is not in my judgment applicable to these facts. There the court held that possessing and selling intoxicating liquors are separate offenses each separately punishable, or, if considered separate steps of a single offense, may be separately penalized without constitutional transgression. There the defendant possessed and he sold, and it was reasoned he might have done either without having done the other. Here he only sold—a criminal act only if

any one or more of the statutory requisities for a lawful sale were absent.

The Fifth Circuit Court of Appeals recently considered the identical question in Ballerini v. Aderholt, Warden, 44 F. (2d) 352, reaching the conclusion that two penalties may not be predicated on a single sale of narcotics. The court overruled its prior decision to the contrary (by the same judge and the same judges sitting) announced in Vamvas v. United States, 13 F. (2d) 347. It is to be hoped that this conflict in decisions of the United States Courts of Appeals for the Fifth and Seventh Circuits may be authoritatively resolved.

I believe that this one "continuous performance," initiated and enacted under the "personal direction" of the Government narcotic agent, and financed by the Government, represents but a single infraction of the law by appellant, and should have been so treated in sentencing him. But I think that in any event the infliction of consecutive and cumulative penalties under each of counts three and five was unwarranted and erroneous.

And on the same day, to wit, on the eleventh day of June, 1931, the following further proceedings were had and entered of record, to wit:

Thursday, June 11, 1931.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present: Hon. Samuel Alschuler, Circuit Judge, presiding; Hon. Evan A. Evans, Circuit Judge; Hon. William M. Sparks, Circuit Judge; Edward M. Holloway, Clerk; Henry C. W. Laubenheimer, Marshal.

4389

HARRY BLOCKBURGER

vs.

UNITED STATES OF AMERICA

Appeal from the District Court of the United States for the Southern District of Illinois, Southern Division

This cause came on to be heard on the transcript of the record from the District Court of the United States for

the Southern District of Illinois, Southern Division, and was argued by counsel.

On consideration whereof: It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

I, Frederick G. Campbell, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing typewritten and printed pages, numbered from 1 to 11, inclusive, contain a true copy of the proceedings had and papers filed (except the briefs of counsel and motions and orders relating to filing of briefs) in the case of Harry Blockburger, Appellant, vs. United States of America, Appellee, No. 4389, October Term, 1930, as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this Fifth day of August A. D. 1931.

Frederick G. Campbell, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.
(Seal United States Circuit Court of Appeals, Seventh Circuit.)

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed November 2, 1931

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted, and the case is advanced and assigned for argument on Monday, November 23rd after the case heretofore assigned for that day.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

SEP 11

CHARLES ELMORE C

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1931.

HARRY BLOCKBURGER,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

374

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, WITH SUPPORTING BRIEF.

HAROLD J. BANDY,
Granite City, Illinois,
Counsel for Petitioner.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1931.

HARRY BLOCKBURGER,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

MOTION FOR WRIT OF CERTIORARI.

Comes now Harry Blockburger, by Harold J. Bandy, his counsel, and moves this Honorable Court that it shall, by certiorari or other proper process directed to the Honorable, the Judges of the United States Circuit Court of Appeals for the Seventh Circuit, require said Court to certify to this Court for its review and determination a certain cause in said Circuit Court of Appeals, lately pending, wherein petitioner, Harry Blockburger, was appellant, and respondent, United States of America, was appellee, and to that end he tenders herewith, his petition and brief with a certified copy of the entire record in said cause in said Circuit Court of Appeals.

HAROLD J. BANDY,
Counsel for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1931.

HARRY BLOCKBURGER,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Harry Blockburger, respectfully represents that he was convicted on counts two, three and five of an indictment in which he was charged with various violations of the Harrison Narcotic Law. Counts two and five involved the same transaction, the unlawful sale of ten grains of morphine to one Ella Rush, the only difference between them being that count two charged that the morphine sold was not in nor from the original stamped package, and count five charged that the sale was not made in pursuance of a written order of Ella Rush and upon a form issued in blank for that purpose by the Commissioner of Internal Revenue.

Upon each of these counts your petitioner received the maximum punishment provided by law. The Court sentenced him to serve a term of five years in the United States penitentiary at Leavenworth, Kansas, upon each of counts two, three and five, to pay a fine of $2,000.00 on each count, and stipulated that the sentences should run consecutively; that imprisonment under count three should follow that under count two and imprisonment under count five should follow that under count three.

Immediately after sentence petitioner presented to the Court his motion to vacate or modify the judgment because (1) the sentence imposed was unreasonable and excessive, and (2) the sentence should not exceed five years in the penitentiary and a fine of $2,000, that being the maximum provided by law, and (3) the sentence imposed was in excess of that provided by law. The Court denied this motion, but allowed petitioner an exception. He appealed to the United States Circuit Court of Appeals for the Seventh Circuit. As one of his assignments of error he alleged that: "The Court erred in imposing an excessive and unreasonable punishment."

The Circuit Court of Appeals for the Seventh Circuit affirmed the judgment of the District Court, but Justice Alschuler filed a dissenting opinion.

Your petitioner respectfully represents that the writ of certiorari should be allowed in this case for the following reasons:

I.

The opinion in this case, concurred in by the majority of the members of the Court of Appeals for the Seventh Circuit, conflicts with the decision of the United States Circuit Court of Appeals for the Fifth Circuit in Ballerini v. Aderhalt, Warden, 44 Fed. (2nd) 352, in which case that Court reached the conclusion that two penalties may not be predicated on a single sale of narcotics. Circuit Judge Alschuler, in his dissenting opinion in petitioner's case, said that:

> "It is to be hoped that this conflict in decisions of the United States Courts of Appeals for the Fifth and Seventh Circuits may be authoritatively resolved."

II.

A confusion now existing in the law will be clarified through the action of this Honorable Court in construing the penal section of the Harrison Narcotic Law, and deciding whether two punishments, each for the maximum fixed by law, may be based on one unlawful sale of narcotics.

III.

The essence of the offense charged in counts two and five was the unlawful sale of ten grains of morphine. The fact that the sale was not from the original stamped package, and also that it was not made in pursuance of a writ-

ten order of Ella Rush and upon a form issued in blank for that purpose by the Commissioner of Internal Revenue, did not justify the imposition of double punishment for the same transaction. The penal section of the Harrison Narcotic Act (Section 705, Title 26, U. S. C.) provides that "any person who violates or fails to comply with **ANY** of the requirements of sections 211 and 691 to 707 of this title shall, on conviction, be fined not more than $2,000 or be imprisoned not more than five years or both, in the discretion of the Court." The plain meaning of this language is that if, BY ONE ACT, such as an unlawful sale, a person violates any OR ALL of the requirements of the act, he shall be subjected only to one punishment.

IV.

The crimes charged in counts two, three and five, on which petitioner was convicted, describe a single continuing transaction. They involve one crime, and petitioner should not have received a sentence exceeding five years in the penitentiary and the payment of a fine of $2,000. This contention is supported by the record, and explained in the following summary of the facts in this case.

The sales of morphine charged in the various counts of the indictment were all made to the same person, and there was no appreciable interval of time between them. This case differs materially from the facts in United States v. Daugherty, 269 U. S. 360, in which each count charged a different sale to a different person and on a different

day, and in which it was held that each sale constituted a separate offense.

Your petitioner was indicted in the United States District Court for the Southern District of Illinois. He was indicted jointly with Margaret Walker, who was acquitted by the jury.

The first count charged that, on May 27, 1929, in the City of Springfield, Illinois, petitioner and Margaret Walker sold two grains of morphine hydrochloride to one Ella Rush, and that same was not then and there in and from the original stamped package.

The second count charged that, on May 28, 1929, in the City of Springfield, Illinois, petitioner and Margaret Walker violated the Harrison Narcotic Act by selling ten grains of morphine hydrochloride to Ella Rush, same not then and there being in and from the original stamped package.

The third count charged petitioner and Margaret Walker with the unlawful sale to Ella Rush of eight grains of morphine hydrochloride on May 29, 1929, from an unstamped package.

The fourth count charged petitioner and Margaret Walker with violating the Narcotic Drugs Import and Export Act approved February 9, 1929, by knowingly, unlawfully, etc., selling and facilitating the transportation, concealment and selling of twenty grains of morphine hydrochloride which had been fraudulently imported into the United States contrary to law. Petitioner was ac-

quitted upon this count. No count remains that charges a violation of this statute.

The fifth count charged that, on May 29, 1929, in the City of Springfield, Illinois, petitioner and Margaret Walker violated the Harrison Narcotic Act by knowingly, unlawfully, fraudulently and feloniously selling, bartering, exchanging and giving away, to Ella Rush, ten grains of morphine hydrochloride, not in pursuance of a written order issued to the said Ella Rush upon a form for that purpose by the Commissioner of Internal Revenue.

Counts one, two, three and five involved three alleged sales of morphine to Ella Rush. Upon count one, which charged the sale of two grains of morphine on May 27, 1929, petitioner was found not guilty. This leaves in the case only two alleged sales to her.

Ella Rush, an admitted drug addict, was the Government's principal witness. She testified she had been employed by a federal narcotic agent to entrap persons who were selling narcotics; that she went to Springfield with Narcotic Agent Bernard Peterson, called at the home of Margaret Walker, a known addict, and introduced herself, using an assumed name; told Mrs. Walker she was employed by a carnival, and that she needed morphine. She testified further that Mrs. Walker told her she did not handle morphine, but that she would see what could be done; that at 11 o'clock that night Mrs. Walker took her to a street corner in Springfield and introduced her to petitioner.

Ella Rush testified that she misrepresented her identity to petitioner when she met him; that she told him she needed and wanted morphine; that he replied that he did not know whether he could get her any that night; that she told him she did not have any and gave him $2.00; that he went away and she and Mrs. Walker entered a restaurant and waited; that he returned in a very few minutes, escorted her from the restaurant to a nearby doorway, and handed her a package of morphine which was wrapped in paper; that she then told him she needed more morphine and gave him $8.00; that about 2 o'clock the following morning petitioner went to her hotel room and delivered about ten grains of morphine to her; that about 11:30 of the same morning he again visited her room, at which time she gave him $10.00 more and requested him to procure $10.00 worth of morphine for her; that about 2 p. m. on the following afternoon he telephoned her and directed her to meet him at the same restaurant; that she went to the restaurant and waited for him, and Narcotic Agent Peterson seated himself at a table in the restaurant to observe the proceedings; that petitioner entered, seated himself beside her, and handed her a package of morphine.

This constitutes the entire transaction upon which the three counts are based.

Ella Rush testified that she was paid $3.00 a day by Narcotic Agent Peterson. She said that, upon arriving in Springfield, she was directed by Narcotic Agent

Howard, whom she met there, to visit certain persons, with whose names and addresses he supplied her, and attempt to purchase morphine, and that, acting upon this instruction, she introduced herself to Mrs. Walker and gave her $10.00 as an inducement for Mrs. Walker to introduce her to some one from whom she could purchase narcotic drugs.

Your petitioner respectfully represents that the facts shown here are decidedly different from those in the Daugherty case, supra, where the sales were to different persons and separated by intervals of several days. The transactions between petitioner and Ella Rush, as described by her, show a continuous transaction, induced by her, with her supplying petitioner with the Government's money and using each delivery of the drug as a leverage to persuade him to procure more of it for her. But in spite of the fact that this evidence disclosed one continuing transaction, involving, in the counts on which petitioner was found guilty, only two deliveries of drugs to the Rush woman, the Court treated this as constituting three separate crimes and committed petitioner to a total of fifteen years in the penitentiary, where he is now serving.

In his motion for a new trial, and in his assignment of errors, which was presented to the Court of Appeals, petitioner complained of errors committed at the trial, which prejudiced him with the jury and deprived him of a fair trial.

The record shows that, in cross-examination, petitioner

was asked if he was personally acquainted with Henry Walker, with John Smith, known as "Cookie" Smith, with Edward Lewis, sometimes known as Clarke, and with Lloyd Hemstrett and "Speck" Mahoney. Petitioner's objections to these questions were overruled and he was allowed an exception. He was then asked this question: "Now, I will ask you if these men, Henry Walker, John Smith, alias "Cookie" Smith, Edward Lewis, alias Clarke, John Mahoney and Lloyd Hemstrett, are not all known to you to be morphine addicts?" His objection to this question was overruled and he again excepted.

Petitioner's brother, George Blockburger, was asked this question in cross-examination, "Are you on the bond of a man named Bapple, who is charged with the violation of the Narcotic Law in this court?" Petitioner's objection was overruled, and he was granted an exception. There is no proof in this record that a man named Bapple was under indictment in that court.

Petitioner objected to certain remarks of the District Attorney in his closing argument to the jury. Ella Rush testified that when she was introduced to petitioner she told him that she was employed by a carnival company that was at that time exhibiting in Springfield, and that she later introduced petitioner to Narcotic Agent Peterson and told him that Peterson was a pickpocket who followed the carnival and engaged in that business. In discussing petitioner to the jury, in the closing argument, the District Attorney said: "Here is a pickpocket, and he wasn't

shocked at that. That is the kind of people they associate with." Upon counsel for petitioner objecting, the Court said to the jury, "The jury will understand that this is Mr. Alexander's conclusion from the evidence."

In discussing Ella Rush, the District Attorney said in his closing argument: "I am an officer of the Government, and the Court is an officer of the Government, and we know Ella Rush." Petitioner objected to this statement, whereupon the Court said: "The jury is instructed to disregard the statement except that the Court has seen her here and has seen the circumstancs under which she comes here."

In another part of his closing argument the District Attorney said, "Most of these narcotic addicts are pickpockets, or a great many of them; we will admit that." The Court sustained petitioner's objection to this statement.

All the foregoing matters fully appear in the printed record.

Your petitioner respectfully submits that all of the grounds, reasons and matters asserted and appearing herein for the granting of this petition are duly authorized, raised, shown and presented by the bill of exceptions and assignment of errors, in due and proper way and place as appears by a certified copy of the record of the entire case and proceedings here present and pointed out in a supporting brief appended to and following this petition.

Petitioner respectfully represents that the United States Circuit Court of Appeals for the Seventh Judicial Circuit erred in deciding:

1. That the sentence imposed in this case did not constitute an excessive and unreasonable punishment.

2. That the sentence imposed in this case did not exceed the maximum provided by the Harrison Narcotic Law.

3. That the transactions in this case comprise three separate and distinct crimes.

4. That petitioner was not prejudiced through being asked, in cross-examination, if he did not know and associate with Henry Walker, with John Smith, known as "Cookie" Smith; with Edward Lewis, sometimes known as Clarke, and with Lloyd Hemstrett and "Speek" Mahoney, and if they were not all known to him to be morphine addicts.

5. That petitioner was not prejudiced by the District Attorney asking his witness, George Blockburger, this question: "Are you on the bond of a man named Bapple, who is charged with violation of the Narcotic Law, in this court?"

6. That petitioner was not prejudiced by the above-quoted remarks of the District Attorney in his closing argument.

7. That petitioner was not prejudiced by the following part of the Court's charge to the jury: "There was a rule at one time that one who had been convicted of a felony

was an incompetent witness. That is not the rule now, but he is a competent witness, and the jury has a right to take the fact of a former conviction into consideration in determining the degree of credibility they will accord to him as a witness, and, if you believe him, to act upon his testimony." It was prejudicial error for the Court to call attention to an extinct law or rule of evidence.

Wherefore, your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Seventh Circuit, commanding the said Court to certify and send to this Court, on a certain day to be therein designated, a full and complete transcript of the record and proceedings of the said Circuit Court of Appeals in the said case therein entitled Harry Blockburger, appellant, v. United States of America, appellee, to the end that the said case may be reviewed and determined by this Court, and that the said judgment of the said Circuit Court of Appeals and of the United States District Court for the Southern District of Illinois in this case, and every part thereof, may be reversed by this Honorable Court.

Your petitioner will every pray.

HARRY BLOCKBURGER,
Petitioner.

By HAROLD J. BANDY,
Attorney for Petitioner.

SUPPORTING BRIEF.

1.

The penalty section of the Harrison Narcotic Law does not contemplate double punishment for the same transaction. This section limits the punishment for one or more violations of the law which all result from the commission of one act to imprisonment in the penitentiary for not more than five years and the payment of a fine of not more than $2,000.00. This penalty section is as follows:

> "Any person who violates or fails to comply with any of the requirements of sections 211 and 691 to 707 of this title shall, on conviction, be fined not more than $2,000.00 or be imprisoned not more than five years, or both, in the discretion of the Court."

Section 705, Title 26 U. S. C.

2.

Two or more penalties, each equaling the maximum punishment provided by law, may not be predicated on a single unlawful sale of narcotics.

Ballerini v. Aderholt, Warden, 44 Fed. (2nd) 352.

3.

The sentence imposed in this case was cruel, excessive, unusual and not warranted by the facts shown in evidence.

In this respect it violated the spirit and language of the Eighth Amendment to the Constitution of the United States, which provides that:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

Respectfully submitted,

HAROLD J. BANDY,
Counsel for Petitioner.

FILE COPY

No. 374.

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CHARLES

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931.

HARRY BLOCKBURGER, Petitioner,

vs.

UNITED STATES OF AMERICA, Respondent.

PETITIONER'S STATEMENT, BRIEF AND ARGUMENT.

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No. 374.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931.

HARRY BLOCKBURGER, Petitioner,

vs.

UNITED STATES OF AMERICA, Respondent.

PETITIONER'S STATEMENT, BRIEF AND ARGUMENT.

STATEMENT.

The District Court did not file a written opinion in this case. The opinion of the Circuit Court of Appeals is reported in 50 Fed. (2d) 795. Justice Alschuler dissented from that opinion and filed a dissenting opinion.

Petitioner was indicted at the June Term, 1929, of the United States District Court for the Southern District of Illinois. He was jointly indicted with one Margaret Walker, who, at the trial, was found not guilty.

The first count of the indictment charged that defendants, on May 27, 1929, in the City of Springfield, Illinois, sold two grains of morphine hydrochloride to one Ella Rush, which was not in and from the original stamped package.

The second count charged that defendants, on May 28, 1929, in Springfield, Illinois, sold ten grains of morphine hydrochloride to Ella Rush, which was not in and from the original stamped package.

The third count charged that defendants sold eight grains of morphine hydrochloride to Ella Rush on May 29, 1929, and that it was not in and from the original stamped package.

The fourth count charged defendant with a violation of the Narcotic Drugs Import and Export Act. This was the only count of the indictment that did not charge a violation of the Harrison Narcotic Law. Petitioner was found not guilty on this count.

The fifth count alleged that defendants, on May 29, 1929, in the City of Springfield, Illinois, sold ten grains of morphine hydrochloride to Ella Rush, which sale was not in pursuance of a written order issued to the said Ella Rush upon a form for that purpose by the Commissioner of Internal Revenue.

The testimony of the Government's witnesses proved

three deliveries of morphine to Ella Rush by petitioner; that the first delivery consisted of two grains, the second of ten grains and the third of eight grains.

Upon count one, which charged the sale of two grains of morphine to Ella Rush, petitioner was found not guilty. Counts two, three and five, upon which he was convicted, involve the second and third sales to her.

Counts two and five each charge the sale of ten grains of morphine hydrochloride to Ella Rush by petitioner. These two counts involve the same sale. The counts differ only in this, that count two charges that the morphine was not then and there in and from the original stamped package, while count five charges that the sale was not made in pursuance of a written order issued to the said Ella Rush upon a form for that purpose by the Commissioner of Internal Revenue.

Count two charges a violation of Section 1 of the Harrison Narcotic Act (U. S. C., Title 26, Sec. 692), which provides, in part, as follows:

> "It shall be unlawful for any person to purchase, sell, dispose or distribute any of the aforesaid drugs except in the original stamped package or from the original stamped package."

Count five charges a violation of section 2 of the same act (U. S. C., Title 26, Sec. 696), which provides that:

> "It shall be unlawful for any person to sell, barter, exchange or give away any of the aforesaid drugs ex-

cept in pursuance of a written order of the person to whom such article is sold, bartered, exchanged or given, on a form to be issued in blank for that purpose by the Commissioner of Internal Revenue."

The judgment of the District Court sentenced petitioner to serve a term of five years in the penitentiary at Leavenworth, Kansas, and to pay a fine of $2,000.00 upon each of counts two, three and five. A sentence of five years in the penitentiary and a fine of $2,000,00 is the maximum punishment permitted by the penal section of the Harrison Narcotic Law (U. S. C., Title 26, Sec. 705). The judgment of the District Court provided, further, that the sentences should run consecutively. In other words, the judgment imposed an aggregate penalty of fifteen years imprisonment and $6,000.00 fine.

In sentencing petitioner to five years in the penitentiary and the payment of a $2,000 fine under count two of the indictment, and inflicting the same sentence under count five, the Court held that the sale of a narcotic which was not in or from the original stamped package constituted one offense; and that the same sale, when not made in pursuance of a written order of the person to whom the narcotic was sold on a form issued in blank for that purpose by the Commissioner of Internal Revenue, constituted a separate crime, and that the person making the sale could be subjected to two distinct punishments, each one equalling the maximum permitted by law.

The penal section of the Harrison Narcotic Law (U. S.

C., Title 26, Sec. 705), provides: "That any person who violates or fails to comply with any of the requirements of this act shall, on conviction, be fined not more than $2,000 or be imprisoned not more than five years, or both, in the discretion of the Court."

After sentence was imposed, petitioner presented his written motion to the District Court, asking the Court to vacate or modify the judgment because (1) the sentence imposed was unreasonable and excessive, and (2) the sentence should not exceed five years in the penitentiary and a fine of $2,000, that being the maximum provided by law, and (3) the sentence imposed was in excess of that provided by law (Rec., p. 38). The Court denied this motion, but allowed petitioner an exception.

One of the errors which petitioner assigned in the Circuit Court of Appeals was that "the Court erred in imposing an excessive and unreasonable punishment" (Rec., p. 43).

The record in this case shows that a federal narcotic agent (Peterson) took one Ella Rush, herself addicted to the use of drugs, to Springfield, Illinois, and employed her there as a decoy to discover persons who were unlawfully selling narcotics and to incite them to make sales to her. Upon her arrival in Springfield she was given the names of several persons and instructed to become acquainted with them. She was told to visit Margaret Walker (co-defendant with petitioner on the indictment), who was an

addict, and who could probably be induced to bring her into contact with persons trafficking in drugs.

The evidence of Ella Rush, as discosed by the record, shows that she went to the home of Margaret Walker, represented herself to the Walker woman as an addict in need of morphine, and that through the use of many false representations and the payment of $10 of the Government's money, won the confidence of the Walker woman and succeeded in persuading her to introduce Rush to petitioner. This testimony shows that on the same night the Walker woman introduced petitioner to Ella Rush and that the Rush woman, through making use of the same false representations, induced petitioner to procure some morphine for her; that she gave petitioner $2 and he later delivered two grains of morphine to her on the same evening; that when he made this delivery to her she gave him $8 more and persuaded him to obtain more of the drug for her, whereupon he went away and returned early the following morning and delivered ten grains of morphine to her; that on the following forenoon she gave him more money and he went away to procure additional drugs for her, meeting her later and delivering eight grains of morphine to her; that she later attempted to induce him to procure more of this narcotic for her, but he refused to do so.

This record shows that, instead of being in Springfield as Government agents for the purpose of detecting vio-

lators of law, Ella Rush and Narcotic Agent Peterson were there for the purpose of inducing people to commit crimes. In order to accomplish this, Ella Rush told petitioner that she was working with a carnival that was showing in Springfield, and that Peterson, to whom she introduced petitioner, was a pickpocket. Peterson, a Government officer, admitted in his testimony that he permitted himself to be introduced to petitioner as a pickpocket. The record shows that disgraceful representations were made to petitioner for the purpose of winning his confidence and inducing him to provide Ella Rush with narcotics.

Ella Rush not only testified that she was an addict, but she stated from the witness stand that she had taken morphine on the very morning of the trial.

ASSIGNMENT OF ERRORS.

Petitioner respectfully represents that the United States Circuit Court of Appeals in the Seventh Judicial Circuit erred in deciding:

1. That the sentence imposed in this case did not constitute an excessive and unreasonable punishment.

2. That the sentence imposed in this case did not exceed the maximum provided by the Harrison Narcotic Law.

3. That the transactions in this case comprise three separate and distinct crimes.

4. That petitioner was not prejudiced through being asked, in cross-examination, if he did not know and associate with Henry Walker; with John Smith, known as "Cookie" Smith; with Edward Lewis, sometimes known as Clarke, and with Lloyd Hemstrett and "Speck" Mahoney, and if they were not all known to him to be morphine addicts.

5. That petitioner was not prejudiced by the District Attorney asking his witness, George Blockburger, this question: "Are you on a bond of a man named Bapple, who is charged with violation of the Narcotic Law, in this court?"

6. That petitioner was not prejudiced by the remarks of the District Attorney in his closing argument.

7. That petitioner was not prejudiced by the following part of the Court's charge to the jury: "There was a rule at one time that one who had been convicted of a felony was an incompetent witness. That is not the rule now; he is a competent witness, and the jury has a right to take the fact of a former conviction into consideration in determining the degree of credibility they will accord to him as a witness, and, if you believe him, to act upon his testimony."

SUMMARY OF ARGUMENT.

The penal section of the Harrison Narcotic Law did not authorize the imposition of separate punishments, each for the maximum provided by law, under counts 2 and 5 of the indictment. These counts involved the same sale, and, although the second count charged that the sale was not made from the original stamped package and the fifth count that it was not in pursuance of a written order upon a form for that purpose furnished by the Commissioner of Internal Revenue, the counts did not charge separate crimes. The language of the penal section of the Harrison Narcotic Law is that: "Any person who violates or fails to comply with any of the requirements of this act shall, on conviction," etc. The plain meaning of this language is that if, **by one act**, such as an unlawful sale, a person violates **any or all** the requirements of the act, he shall be subjected only to one punishment.

The entire transaction between petitioner and Ella Rush, as alleged in counts 2, 3 and 5 of the indictment and disclosed by her testimony, involves only one crime, and petitioner should have been subjected only to one punishment not exceeding the maximum provided for by the penal section of the Harrison Narcotic Law.

The conduct of the District Attorney in repeatedly asking petitioner and one of his witnesses inflammatory and improper questions in cross-examination for the sole purpose of prejudicing the jury against petitioner, and the

additional improper conduct of the District Attorney in making unwarranted statements not supported by the testimony in his closing argument to the jury deprived petitioner of a fair trial.

In the printed memorandum filed by the Solicitor General it is suggested that the cross-examination and argument which we criticize do not present questions of general importance and do not warrant review on certiorari. With this we do not agree. When the record of a case shows that a citizen, on trial in a federal court, has, through the conduct of the Prosecuting Attorney, been deprived of a fair trial, and that his conviction has been accomplished, in part, by the improper conduct of the prosecutor, a question of general importance is presented because no principle is more deeply engrafted into American jurisprudence than that every citizen shall be given a fair and impartial trial in an impartial tribunal in accordance with the law of the land. It is important that this right shall never be challenged or taken from a citizen. Section 240 (a) of the Judicial Code (U. S. C., Title 28, Sec. 347) provides that when a case comes to the Supreme Court by certiorari it shall "be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the case had been brought there by unrestricted writ of error or appeal." We respectfully submit that this language permits this Honorable Court to review the entire case, including everything that happened at the trial.

ARGUMENT.

MAY IT PLEASE THE COURT:

The penal section of the Harrison Narcotic Law provides that

> "any person who violates or fails to comply with any of the requirements of this act shall, on conviction, be fined not more than $2,000.00 or be imprisoned not more than five years, or both, in the discretion of the Court."

The question to be considered here is, what did Congress intend by these words?

In 25 R. C. L., Sec. 217, it is said:

> "The intention and meaning of the Legislature must primarily be determined from the language of the statute itself, and not from conjectures aliunde. When the language of a statute is plain and unambiguous, and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning."

In U. S. v. Wiltberger, 5 Wheat. 76, Chief Justice Marshall, in delivering the opinion of the Court said:

> "The intention of the Legislature is to be collected from the words they employ. * * * The case must be a strong one, indeed, which would justify a Court

in departing from the plain meaning of words, especially in a penal act, in search of an intention which the words themselves do not suggest."

This language was quoted with approval in U. S. v. Bitty, 208 U. S. 393.

In U. S. v. Fisher, 109 U. S. 143, it was said:

"'A legislative act is to be interpreted according to the intention of the Legislature apparent upon its face."

In U. S. v. Reese, 92 U. S. 214, the Court said:

"This is a penal statute and must be construed strictly; not so strictly, indeed, as to defeat the clear intention of Congress, but the words employed must be understood in the sense they were obviously used."

This language was quoted with approval in Butts v. Merchants and Miners Transportation Company, 230 U. S. 126.

In 25 R. C. L., Section 301, it is said:

"It has long been the well-settled general rule that penal statutes are subject to the rule of strict construction. They will not be construed to include anything beyond their letter, even though within their spirit, and nothing can be added to them by inference or intendment. More correctly, it may be said that such laws are to be expounded strictly against an offender and liberally in his favor. This can be accomplished only by giving to them a literal construction, so far as they operate penally."

Judged by these rules of construction, we respectfully submit that the language of the penal section of the Harrison Law which says that "any person who violates or fails to comply with any of the requirements" means any or all, one or more, of the requirements of the act. **It clearly means that if, by one act, such as an unlawful sale, a person violates one or more of the requirements of the act, he shall be subjected only to one punishment.**

If Congress had intended otherwise, it should have said: "For each violation of this act, **or any of its provisions,** a person, upon conviction, shall be punished," etc. This Congress did not say, and this it certainly did not mean. If, through making a sale of narcotics, a person violates section 1 of the act because the morphine is not sold from an original stamped package, and if he, by the same act, also violates section 2 because the sale is not made in pursuance of a written order, he commits only one crime and subjects himself only to one offense. As stated by the Circuit Court of Appeals for the Fifth Circuit in Ballerinai v. Aderholt, 44 Fed. (2d) 352, "At last it was the sale, and not the failure to register, pay the tax or secure the written order, that constituted the offense."

The Court of Appeals for the Seventh Circuit, in affirming the judgment in this case (50 F. [2nd] 792), says: "The test of identity of offenses is whether the same evidence is required to sustain them; if not, then the fact that both charges relate to and grow out of one transaction does not make a single offense where two are defined

~~fonded~~ by statute." This statement, although correctly announcing a principle of law in the abstract, is inapplicable to this case because it ignores the language of the penal section of the Harrison Law which provides a single punishment for violation of ANY of the requirements of the act.

The opinion of the Court of Appeals calls attention to the fact that distinct violations of law growing out of the same act constitute distinct offenses and may be separately punished under various existing penal statutes. The Court states that one act may constitute a violation of several provisions of the National Prohibition Law and require the imposition of separate punishments. The case of Albrecht v. U. S., 273 U. S. 1, is cited in support of this proposition. The analogy is not in point, however, because the National Prohibition Law provides separate punishments for violation of different sections of the law. It is plainly apparent from reading the Prohibition Law that Congress intended that more than one punishment should be imposed if one act should constitute a violation of more than one section. A specific punishment is provided for manufacturing liquor, one for selling liquor, and the penal section of that law then provides that if any person "violates any of the provisions of this chapter, for which offense a special penalty is not prescribed, shall be fined for a first offense not more than $500."

The Harrison Narcotic Law was enacted as a revenue measure. It was only under this guise that it could pos-

sibly be justified as a proper exercise of the legislative function of Congress under the Constitution. It was as a revenue measure that its validity was upheld by a sharply divided court in U. S. v. Doremus, 249 U. S. 86. The penal provisions of this law are merely incidental to it, and were inserted for the purpose of making the act more effective. Inasmuch as it was not enacted as a criminal law, no construction should be placed upon it which would go beyond the limits of the plain meaning of the words contained in the penal section.

For these reasons we respectfully submit that the Court erred in punishing petitioner separately under counts two and five of the indictment.

2.

We respectfully submit that the testimony of Ella Rush discloses only one crime, and that petitioner should have been subjected to only one punishment. Respecting this, we here quote from the dissenting opinion of Circuit Judge Alschuler, in which he says:

> "But here, accepting at par the evidence for the Government, it seems to me but a single crime appears. Witness Ella Rush, herself an addict, was the keystone of the Government's case. She had been regularly employed by a federal narcotic agent as a decoy to ferret out persons who were unlawfully selling narcotics. She reported for duty at Springfield and sought out a woman named Walker (a codefendant), representing that she wished to buy morphine.

On the night of May 27, 1929, Walker brought appellant to Rush, who, after various pretenses concerning herself, gave appellant $2, requesting him to get her some morphine. He went out and, returning a little later, brought her the morphine. At the same time she gave him $8 more, requesting him to bring her more of the drug. In a few hours he again returned with about ten grains more, and a little later the same day she gave him $10 for more morphine, which he brought her the day following. She asked him for more, but he evidently had become suspicious and did not bring it, whereupon he was arrested. She also paid Walker $10 for introducing her to appellant, all the funds being supplied by the narcotic agent.

"The situation here is decidedly different from that in the Daugherty case, where the sales were to different persons, and separated by intervals of several days. Here the transactions were between the same parties, and in pursuance of the same definite purpose and plan of the narcotic agent to have this person detected and taken in the act of violating the law. The transactions between appellant and Rush, which are alone the foundation of the charge, show a sort of 'continuous performance,' Rush supplying him with the Government's money, and employing each delivery of the drug as an immediate leverage for inducing him to procure more of the same. There was substantially no interval of time between the receiving of one and the advancing of the money for the next installment.

"I do not question the propriety, in proper cases such as this, of resorting to such means for detecting and punishing crime, but if, in the detecting process,

the Government sees fit to make an installment affair of it, I do not think the Government is in position to say that each installment of such a general operation constitutes a separate crime. The agent conducted the affair with an unbroken continuity, with the motive and plan of adducing proof that this man could and would and did unlawfully procure and sell and deliver narcotic drugs. It was essentially more a buying than a selling transaction. The Government procured it to be done. The sectional nature of the transaction was a device of the agent, not of appellant, who would no doubt have been quite willing to sell the entire quantity at once instead of on the federal agent's 'installment plan.' ''

We believe that this language, taken from the dissenting opinion, should be adopted as the law of this case. Inasmuch as the deliveries of drugs were all to the same person, a Government informer, and were incited and induced by the informer, petitioner should be held answerable only for one crime.

3.

The prosecution went to great lengths to prejudice the jury against petitioner. He was asked in cross-examination if he was personally acquainted with Henry Walker and with John Smith, known as "Cookie Smith"; if he knew William Bapple, Edward Lewis, sometimes known as "Clarke"; Lloyd Hemstrett and "Speck" Mahoney. He was then asked this question:

"Now, I will ask you if these men, Henry Walker, John Smith, alias 'Cookie' Smith; Edward Lewis, alias 'Clarke'; John Mahoney, known as 'Speck' Mahoney, and Lloyd Hemstrett, are not all known to you to be narcotic addicts" (Rec., pp. 22-23).

Appellant's objection to the foregoing questions were overruled and he was required to answer. These questions were grossly improper. They were asked for the purpose of creating prejudice in the minds of the jurors through the insinuation that petitioner associated with drug addicts. Proof that he associated with addicts would not have corroborated the charge that he sold morphine to Ella Rush.

Petitioner denied selling any narcotics to the Rush woman. The question of whether he did sell to her should have been submitted to the jury without the injection of these prejudicial questions.

Petitioner's brother, George Blockburger, was asked, in cross-examination (Rec., p. 27):

"Are you on the bond of a man named Bapple, who is charged with the violation of the Narcotic Law in this Court?"

An objection to this question was overruled. It had not been shown that Bapple was under indictment in that court. The question was not based upon any evidence and was asked for the sole purpose of prejudicing petitioner's defense.

In the closing argument to the jury the District Attorney said:

> "I am an officer of the Government, and the Court is an officer of the Government, and we know Ella Rush" (Rec., p. 28).

Petitioner promptly objected to this improper statement, whereupon the Court said:

> "The jury is instructed to disregard the statement except that the Court has seen her here, and has seen the circumstances under which she comes here."

This language of the Court, although purporting to sustain the objection, undertook to justify the improper argument of the District Attorney.

Later the District Attorney, in his closing argument, said:

> "Here is a pickpocket, and he wasn't shocked at that. That is the kind of people they associate with."

Petitioner again objected (Rec., p. 29), whereupon the Court said to the jury:

> "The jury will understand this is Mr. Alexander's conclusion from the evidence."

The improper statement was permitted to stand. There had been no testimony that there was a pickpocket any-

where. The only testimony had been that Ella Rush falsely introduced narcotic agent Peterson as a pickpocket when he was, in fact, a Government agent, and that Peterson had falsely represented himself to be a pickpocket. There was no testimony in the record to show that petitioner associated with pickpockets or that he, himself, was one. We submit that the prejudicial conduct of the District Attorney throughout cross-examination and argument, entitles petitioner to reversal of this judgment and a new trial.

Conclusion.

We respectfully submit that the record of this case discloses only one crime. The judgment is erroneous and excessive because it imposes triple punishment. This judgment should either be corrected in this court or reversed with directions to the District Court to correct it so that it will provide that the punishment of petitioner shall not exceed five years imprisonment and a fine of $2,000.00.

If it should be that this Honorable Court does not agree with our contention that only one crime has been proved, we submit that the law does not permit dual punishment for one sale of narcotics, and that, for this reason, the imposition of the maximum punishment under both counts two and five, each involving the same sale, was erroneous, and that this Honorable Court should either correct the

judgment here by providing that the dual punishment under counts two and five shall not exceed five years imprisonment and a fine of $2,000.00, or remand the case to the District Court with direction to that Court to correct the judgment accordingly.

Respectfully submitted,

HAROLD J. BANDY,
Granite City, Illinois,
Attorney for Petitioner.

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No. 374

In the Supreme Court of the United States

OCTOBER TERM, 1931

HARRY BLOCKBURGER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1931

No. 374

HARRY BLOCKBURGER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

The United States does not oppose the granting of the petition for certiorari but suggests that the Court limit its review to the questio[illegible]ated below.

OPINIONS BELOW

No opinion was rendered by the District Court. The opinion of the Circuit Court of Appeals (R. 60), one judge dissenting (R. 65), is reported in 50 F. (2d) 795.

JURISDICTION

The judgment sought to be reviewed was entered June 11, 1931. (R. 68–69.) The petition for cer-

tiorari was filed September 11, 1931. Although he does not so state, petitioner presumably invokes the jurisdiction of this Court under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

We suggest that the Court limit its review to the following question:

Whether a single sale of narcotics not in or from the original stamped package, and not in pursuance of a written order of the purchaser upon a blank form provided for that purpose by the Commissioner of Internal Revenue, is punishable only as one offense.

The other questions raised by petitioner are not of sufficient importance to warrant review by this Court on certiorari.

STATUTES INVOLVED

The pertinent provisions of the Harrison Narcotic Act are printed in the Appendix, *infra*, pages 6–7.

STATEMENT

The indictment in this case contained five counts. Petitioner was convicted under the second, third, and fifth counts. (R. 9.) The second count (R. 4) charged a sale on May 28, 1929, and the third (R. 4–5) a sale on May 29, 1929, of morphine hydrochloride not in or from the original stamped package. The fifth count (R. 6) charged a sale on the

latter date of morphine hydrochloride not in pursuance of a written order by the purchaser upon a blank form supplied for that purpose by the Commissioner of Internal Revenue. The second and third counts were based upon Section 1 of the Harrison Act as amended by the Revenue Act of 1926. (*Infra*, p. 6.) The fifth count was based upon Section 2 of the Harrison Act. (*Infra*, p. 6.) Petitioner was sentenced to serve five years' imprisonment and to pay a fine of $2,000 upon each count on which he was convicted, the terms of imprisonment to run consecutively. (R. 10.) On appeal the conviction was affirmed (R. 60–64), one judge dissenting (R. 65).

DISCUSSION

The evidence contained in the bill of exceptions shows three distinct sales of narcotics made successively on May 27, 28, and 29, 1929. (R. 11–15.) The court below treated the sale of May 29th as supporting the charges contained in the third and fifth counts of the indictment. (R. 62.) On each of these counts the maximum punishment prescribed by the Harrison Act (Sec. 9, *infra*, pp. 6–7) of five years' imprisonment and a fine of $2,000 was imposed, the terms of imprisonment to run consecutively. (R. 10.) The petitioner contends that a single sale of narcotics constitutes but one offense, even though such sale may violate different provisions of the Harrison Act. He therefore argues that the punishment for a single sale may not ex-

ceed the maximum prescribed in the statute, and that his sentence upon conviction under the third and fifth counts was not authorized by law. The dissenting judge in the court below agreed with petitioner's view. (R. 67.) The majority of the court were of the opinion, however, that two offenses resulted from the sale, as it violated two separate provisions of the Act and as the same evidence would not support conviction for both violations. It therefore held that double punishment for one offense did not result from the sentence imposed. (R. 62–63.) In so holding the majority recognized that their decision was in conflict with that of the Circuit Court of Appeals for the Fifth Circuit in *Ballerini* v. *Aderholt*, 44 F. (2d) 352 (R. 63), and the dissenting judge expressed the hope that "this conflict in decisions * * * may be authoritatively resolved" (R. 68).

As there appears to be a conflict between the two decisions, we do not oppose a review of this question.

Petitioner's contention that the three sales of narcotics which were proved constituted, in effect, but a single transaction is, we submit, without merit. The sales were consummated on successive days, and we submit that the fact that the sales were made to the same individual instead of to different persons does not distinguish the case from *United States* v. *Daugherty*, 269 U. S. 360, which is controlling.

The other contentions urged by petitioner are sufficiently disposed of in the opinion below. They present no questions of general importance and do not warrant review on certiorari.

Respectfully submitted.

THOMAS D. THACHER,
Solicitor General.

OCTOBER, 1931.

APPENDIX

HARRISON NARCOTIC ACT

Sec. 1, as amended by the Revenue Act of 1926, c. 27, 44 Stat. 9, 97; U. S. C.; Title 26, Sec. 692, so far as pertinent, provides:

* * * * * *

> It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the aforesaid drugs except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps from any of the aforesaid drugs shall be prima facie evidence of a violation of this section by the person in whose possession same may be found; * * *

Sec. 2 (c. 1, 38 Stat. 785, 786; U. S. C., Title 26, Sec. 696) provides in part as follows:

> That it shall be unlawful for any person to sell, barter, exchange, or give away any of the aforesaid drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Commissioner of Internal Revenue. * * *

Section 9 (38 Stat. 789; U. S. C., Title 26, sec. 705) provides:

> That any person who violates or fails to comply with any of the requirements of this

Act shall, on conviction, be fined not more than $2,000 or be imprisoned not more than five years, or both, in the discretion of the court.

* * * * *



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No. 374

In the Supreme Court of the United States

OCTOBER TERM, 1931

HARRY BLOCKBURGER, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

No opinion was rendered by the District Court. Its charge to the jury appears at R. 29–35. The opinion of the Circuit Court of Appeals (R. 60) and the dissenting opinion (R. 65) are reported in 50 F. (2d) 795.

JURISDICTION

The judgment to be reviewed was entered on June 11, 1931. (R. 68–69.) Petition for certiorari was filed on September 11, 1931, and granted on November 2, 1931 (R. 70), pursuant to Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

The following questions are presented:

1. Whether a single sale of narcotics not in or from a stamped package, and not in pursuance of a written order of the purchaser upon a blank form provided for that purpose by the Commissioner of Internal Revenue, is punishable as two offenses.

2. Whether two sales of narcotics not in or from a stamped package, which sales were made to the same purchaser on consecutive days, constitute two offenses.

3. Whether prejudicial error was committed in permitting cross-examination of petitioner, who was the defendant below charged with unlawful sale of narcotics, as to his acquaintance and association with certain narcotic addicts.

4. Whether prejudicial error was committed in permitting cross-examination of a witness called by the defendant as to whether he was a surety on the bond of a man charged with violating the Narcotic Act.

5. Whether certain remarks made by the District Attorney in his summing up require a reversal of the conviction.

6. Whether a portion of the charge of the court to the jury constituted prejudicial error.

STATUTES INVOLVED

The pertinent provisions of the Harrison Narcotic Act are printed in the Appendix, *infra*, pages 25–26.

STATEMENT

The indictment in the case contained five counts. Petitioner was convicted under the second, third, and fifth counts only. (R. 9.) The second count (R. 4) charged a sale to Ella Rush on May 28, 1929, and the third (R. 4–5) a sale to Ella Rush on May 29, 1929, each sale being of morphine hydrochloride not in or from the original stamped package. The fifth count (R. 6) charged a sale to Ella Rush on the latter date of morphine hydrochloride not in pursuance of a written order by the purchaser upon a blank form supplied for that purpose by the Commissioner of Internal Revenue. The second and third counts were based upon that portion of Section 1 of the Harrison Act, as amended by the Revenue Act of 1926, which is printed on p. 25, *infra*. The fifth count was based upon that portion of Section 2 of the Harrison Act which is printed on p. 25, *infra*. Petitioner was sentenced to serve five years' imprisonment and to pay a fine of $2,000 upon each count on which he was convicted, the terms of imprisonment to run consecutively and the fines to be cumulative. (R. [illegible]0.) On appeal the judgment was affirmed (R. 68–69), with one judge dissenting (R. 65).

The evidence contained in the bill of exceptions shows three distinct sales of narcotics to Ella Rush, one on May 27, another on May 28, and another on May 29, 1929 (R. 11–15), but the court below treated the one sale on May 29th as supporting the

charges contained in the third and fifth counts of the indictment (R. 62), and we do not challenge the propriety of this view.

SUMMARY OF ARGUMENT

I

The sentence imposed was permitted by law. "The test of identity of offenses is whether the same evidence is required to sustain them; if not, then the fact that both charges relate to and grow out of one transaction does not make a single offense where two are defined by the statutes." Here, although the same sale was the basis for conviction under the third count and the fifth count, different evidence was required for each. In order to sustain the conviction under the third count under Section 1 of the Act, evidence was required that the package was not stamped, and to sustain the conviction under the fifth count under Section 2, evidence was required that the sale was not made upon the form of order prescribed by the Commissioner.

As the other count upon which the petitioner was convicted, the second count, charged, and was sustained by proof of, a sale made on the day before the sale which is the basis of the third and fifth counts, it was proper to impose a separate sentence on this second count. Two separate sales to the same persons on different days must be treated as

separate offenses, even though part of a "continuous performance."

The language of Section 9 of the Act "that any person who violates or fails to comply with any of the requirements of this Act shall, on conviction," be fined or be imprisoned, or both, must be construed to prescribe a separate penalty for each violation of the statute, even if two violations of the statute are consummated by the same act.

II

Reversible error was not committed in permitting the cross-examination of which the petitioner complains.

III

The judgment should not be reversed on account of the remarks made by the prosecuting attorney during his closing argument.

IV

There is no merit in the petitioner's exception to a portion of the charge of the District Court to the jury.

ARGUMENT

I

THE SENTENCE IMPOSED WAS PERMITTED BY LAW

The petitioner contends that the law authorized the imposition of not more than five years' imprisonment and a $2,000 fine as the maximum sen-

tence for all of the conduct of which he was found guilty. In support of this conclusion he apparently makes three separate contentions, (1) a single sale can not constitute two distinct offenses under the statute, (2) the two separate sales of which the petitioner was convicted constituted only one offense, as the transactions "show a sort of continuous performance;" and (3) a violation of two requirements of the statute does not subject him to more than one punishment.

We submit that all of these contentions are disposed of by decisions of this Court.

(1) As this Court said in *Morgan* v. *Devine*, 237 U. S. 632, 641:

> * * * the test of identity of offenses is whether the same evidence is required to sustain them; if not, then the fact that both charges relate to and grow out of one transaction does not make a single offense where two are defined by the statutes. * * *

For recent applications of this principle, see *King* v. *United States*, 280 U. S. 521; *Albrecht* v. *United States*, 273 U. S. 1; *Ebeling* v. *Morgan*, 237 U. S. 625; *Gavieres* v. *United States*, 220 U. S. 338; *Burton* v. *United States*, 202 U. S. 344.

In *King* v. *United States*, 280 U. S. 521, *supra*, the petitioner was convicted under an indictment under Section 4 of the Harrison Act for sending morphine from one State to a person in another State, without having registered and paid the special tax as required by Section 1 of the Act. He

was sentenced to five years' imprisonment. Prior to trial he filed a plea alleging in substance that the offense described in that indictment was the same act as that described in a previous indictment which charged a sale of the same morphine "not in or from the original stamped package" in violation of Section 1 of the Act. The plea also averred that he had pleaded guilty to the first indictment and that under that indictment he had been sentenced to pay a fine and to serve one day in jail, which term he had served. The testimony sustained the allegations of the plea, as appears from the following extract copied from the record in that case (No. 70, October Term, 1929, R. 26–27):

> The testimony of witnesses on behalf of the United States proved the following facts: That on or about the 5th day of September, 1928, C. V. B. Moore, a narcotic agent, employed by the United States, together with an informant, went to Reno, Nevada, and at said time, while in Reno, Nevada, said informant, at the direction of said narcotic agent, wrote a letter to the defendant, Fred I. King, requesting the said Fred I. King to send to said informant at Reno, Nevada, one ounce of morphine. Defendant replied that he would secure the same and advised the informant that it would cost $55.00. Whereupon the informant sent to the defendant a registered letter enclosing a postal-money order for $55.00, which said money order was received by the de-

> fendant and cashed by him. Thereafter, on or about the 26th day of September, 1928, the defendant, Fred I. King, caused to be shipped by American Express from San Francisco to Reno, Nevada, addressed to the said informant, a package containing approximately one ounce of morphine. Said defendant had not registered nor paid the special tax as required by Section I of the Act of December 17th, 1914, and as amended; that the said package of morphine is the identical and same package of morphine referred to and described in the former indictment against the defendant, Fred I. King, returned and filed on October 2nd, 1928 (No. 20104–L) to which the defendant, Fred I. King, plead GUILTY and was convicted and sentenced by District Judge Bourquin on October 5th, 1928 * * *.

But the Circuit Court of Appeals (31 F. (2d) 17) and this Court sustained the judgment on the second indictment.

The situation in the *King case* differs but slightly from that in the instant case. The only possible distinction which can be urged is that in the *King case,* although the defendant was punished twice for one act, that was because that act resulted in two legal consequences, a sale and an interstate shipment, whereas in the instant case the ultimate act which is punished twice has but one legal consequence, a sale. But it should be borne in mind that what is denounced by the Harrison Act is not

a sale *qua* sale. Congress has no power to prohibit sales as such. Its power over sales of drugs is predicated upon its right to lay taxes, and the criminal provisions of the statute are designed to prevent evasions of the tax laid. In order to prevent such evasions it may prescribe punishment for a violation of each requirement which it prescribes. See *Nigro* v. *United States,* 276 U. S. 332, 341–342; *Alston* v. *United States,* 274 U. S. 289, 294.

The scheme of the Harrison Act is not first to prescribe all steps which must be taken and then to provide that any sale which is not made in compliance with all the requirements shall be punished. The framework of the Act is entirely different. Under separate sections different acts are declared unlawful. The gist of the offense denounced by the provision of Section 1 here involved is a dealing with drugs except in the original stamped package; such a dealing need not be a sale, and it may be a purchase. The gist of the offense under Section 2 is a *delivery* of drugs except in pursuance of a written order, and the offense denounced by this section is not committed by a person who *purchases* without making out such an order.

Although in the instant case it is true that the same sale was the basis for the convictions under both the third count and the fifth count, different evidence was required to sustain the conviction under these counts—evidence that the package was not stamped, in order to sustain the conviction

under the third count, under Section 1, and evidence that the sale was not made upon the form of order prescribed by the Commissioner in order to sustain the conviction under the fifth count, under Section 2.

The petitioner apparently does not contend that the provisions of Section 2 may not apply to the sale of drugs in an unstamped package. Anyway, such a conclusion would seem to be contrary to the opinion of this Court in *Nigro* v. *United States,* 276 U. S. 332, *supra,* which held that the provisions of Section 2 here involved apply to "all persons within the jurisdiction" and not merely those who by Section 1 are required to register and pay the tax. The Court said (pp. 345, 351):

> It would seem to be admissible and wise, in a law seeking to impose taxes for the sale of an elusive subject, to require conformity to a prescribed method of sale and delivery calculated to disclose or make more difficult any escape from the tax. If this may be done, any departure from the steps enjoined may be punished, and added penalties may be fixed for successive omissions, but all for the one ultimate purpose of making it difficult to sell opium or other narcotics without registering or paying the tax.
>
> * * * * *
>
> * * * There is no incongruity in increasing the criminal liability of the non-registered seller who fails to use an order form in his sales, or who misuses it.

This decision and particularly the language just quoted indicate clearly that the same act may be a separate offense under Sections 1 and 2 and that each may be punished separately.

On the precise point here involved, the decisions of the Circuit Courts of Appeals are in conflict. In *Ballerini* v. *Aderholt,* 44 F. (2d) 352, the Circuit Court of Appeals for the Fifth Circuit held that a sale which violated those provisions of Section 1 and Section 2, which were violated by the petitioner in the instant case, constituted but one offense, whereas in *Haggerty* v. *United States,* 52 F. (2d) 11, the Circuit Court of Appeals for the Eighth Circuit followed the decision in the instant case. (The *Haggerty case* is now pending before this Court on petition for certiorari, No. 460, October Term, 1931.) See also *Copperthwaite* v. *United States,* 37 F. (2d) 846 (C. C. A. 6th).

---

(2) The two separate sales to the same person on different days must be treated as separate offenses. The second count charged, and the proof showed, a sale on May 28, while the other counts on which petitioner was convicted charged, and the proof showed, another sale on May 29.

Although the evidence does show that both sales were made to the same person, who was acting throughout in pursuance of a plan to obtain evidence against the petitioner, and that substantially no interval of time elapsed between the delivery of

one quantity of the drug and the payment of money for another quantity to be delivered in the future, and that consequently the two were, as the dissenting judge below characterized them, part of a "continuous performance," we submit that these facts are insufficient to amalgamate the two sales into one offense.

As the majority opinion of the court below said (R. 62):

> * * * There is nothing in the statute to indicate that Congress intended that such a state of facts should be considered as a continuing offense, or that such an offender should suffer but one penalty, or that the aggregate penalties should not exceed the maximum penalty provided for a separate offense. The offenses charged and proved are as separate and distinct as if appellant had sold the drug to different parties on the dates mentioned.

In *United States* v. *Daugherty,* 269 U. S. 360, this Court held that unauthorized sales of cocaine to three different persons on different days constituted three separate offenses, and that the maximum sentence of five years' imprisonment might be imposed for each offense.

---

(3) The petitioner's main contention is that the only section of the statute prescribing penalties—Section 9—in providing "that any person who violates or fails to comply with any of the require-

ments of this Act shall, on conviction," be fined or be imprisoned or both means that a person who violates one or more of the requirements of the statute *by one act* shall be subjected to only one punishment.

Although, as far as we can ascertain, this precise contention has not been previously made in any case in this Court, it is made in the teeth of the decision in the *King case*. There the two sentences imposed aggregated five years and one day, more than the maximum term of imprisonment prescribed by the statute for "any person who violates * * * any of the requirements of this Act." This language of the statute does not, we submit, indicate that several violations of the statute by one act shall be visited with but one punishment. This language, in prescribing the punishment, is similar to that used in many other acts,[1] and we believe that it has never been held that such language has such effect as the petitioner ascribes to it. It is true that the language of Section 9 does not specifically provide that each violation of the Act shall subject the offender to a separate penalty. But if it is not to be so interpreted, it would seem to follow that no person who violates the Act can be punished more than once, regardless of the number of times he violates the Act by entirely separate transactions.

[1] See, for example, 35 Stat. 1088, 1135 (Criminal Code, Section 235), 1145 (Criminal Code, Section 289); 36 Stat. 822, 824; 37 Stat. 240, 241; 41 Stat. 1444, 1445; 44 Stat. 918.

It would be little less absurd to construe the Act in accordance with the petitioner's contention.

II

REVERSIBLE ERROR WAS NOT COMMITTED IN PERMITTING THE CROSS-EXAMINATION OF WHICH PETITIONER COMPLAINS

The petitioner argues that he was prejudiced by the refusal of the trial court to sustain certain objections which he made to questions which were asked of the petitioner himself on cross-examination. The following is a transcript of so much of the record as it is necessary to consider in this matter (R. 22–23):

[The petitioner testified:]

> I buy job lots of women's ready-to-wear dresses, hosiery, and underwear, and sell them.
>
> * * * * *
>
> I have no other employment aside from what I have mentioned. I spend a great deal of time on the streets in Springfield. I am not personally acquainted with Henry Walker. I know John Smith, alias "Cookie" Smith.
>
> Q. Do you know a man named William Bapple?
>
> A. Yes.
>
> Mr. BAKER. I object, as improper cross-examination.
>
> The COURT. Let him answer.
>
> (To which action of the Court the defendant then and there excepted.)

WITNESS. Yes, sir; I do.

WITNESS (continuing): I know Edward Lewis, sometimes known as "Clarke."

I am personally acquainted with Bapple. I have merely a casual acquaintance with the others.

I know John Mahoney, sometimes called "Speck." I know him to speak to. I don't think I have talked to him over a half a dozen times in six or seven years. I know Lloyd Hemstrett.

Q. When is the last time you talked to "Speck" Mahoney?

Mr. BANDY. That is objected to as being immaterial and not cross-examination.

The COURT. I don't see the materiality of it but he may answer.

(To which ruling of the court the defendant then and there excepted.)

A. I don't know. I talked to him out there the other day in the court room. I don't remember just what day it was.

I know John Smith more than casually. I met him in the restaurant and different places around town. I never associated with him.

Q. Now I will ask you if these men Henry Walker, John Smith, alias "Cookie" Smith, Edward Lewis, alias "Clarke," John Mahoney, known as "Speck" and Lloyd Hemstrett are not all known to you to be morphine addicts?

Mr. BANDY. We object, because it is immaterial, prejudicial, and not cross-examination.

The COURT. He may answer.

(To which ruling of the court the defendant then and there excepted.)

A. Well, I have heard of some of those fellows; I have heard about Hemstrett. In fact if you go out to a ball game they call him a dope head and everything like that, but to know that he actually uses it, I don't know; I have never seen him use any dope.

Mr. ALEXANDER. How about the others?

WITNESS (continuing). I have never heard of Mahoney using dope. I heard that "Clarke" was a dope fiend, but I don't know it to be a fact. * * *

In order to appreciate the bearing of these questions, it should be noted that the petitioner in his previous testimony had not merely denied that he had made the sales in question but had also asserted that he told persons who appeared as witnesses for the Government that he did not know of any place where they could get morphine. (R. 21.) He also testified on cross-examination that his only employment was selling women's apparel. The cross-examination in question appears to have been a proper attempt to throw doubt upon the truthfulness of the previous testimony of the witness, and also to "place the witness in his proper setting." As this Court said in *Alford* v. *United States*, 282 U. S. 687, 691–692, and 694:

> Cross-examination of a witness is a matter of right. *The Ottawa*, 3 Wall. 268, 271. Its permissible purposes, among others, are that

the witness may be identified with his community so that independent testimony may be sought and offered of his reputation for veracity in his own neighborhood. Cf. *Khan* v. *Zemansky,* 59 Cal. App. 324, 327ff.; 3, Wigmore, Evidence (2d ed.) sec. 1368 I (1) (b); that the jury may interpret his testimony in the light reflected upon it by knowledge of his environment, *Kirschner* v. *State,* 9 Wis. 140; *Wilbur* v. *Flood,* 16 Mich. 40; *Hollingsworth* v. *State,* 53 Ark. 387; *People* v. *White,* 251 Ill. 67, 72ff.; *Wallace* v. *State,* 41 Fla. 547, 574ff.; and that facts may be brought out tending to discredit the witness by showing that his testimony in chief was untrue or biased. *Tla-Koo-Yel-Lee* v. *United States,* 167 U. S. 274; *King* v. *United States,* 112 Fed. 988; *Farkas* v. *United States,* 2 F. (2d) 644; see *Furlong* v. *United States,* 10 F. (2d) 492, 494.

Counsel often can not know in advance what pertinent facts may be elicited on cross-examination. For that reason it is necessarily exploratory; and the rule that the examiner must indicate the purpose of his inquiry does not, in general, apply. *Knapp* v. *Wing,* 72 Vt. 334, 340; *Martin* v. *Elden,* 32 Ohio St. 282, 289. It is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what facts a reasonable cross-examination might develop. Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and

> put the weight of his testimony and his credibility to a test, without which the jury can not fairly appraise them. *Tla-Koo-Yel-Lee* v. *United States, supra; King* v. *United States, supra; People* v. *Moore,* 96 App. Div. 56, affirmed without opinion, 181 N. Y. 524; cf. *People* v. *Becker,* 210 N. Y. 274. * * *
>
> * * * * * *
>
> The extent of cross-examination with respect to an appropriate subject of inquiry is within the sound discretion of the trial court. It may exercise a reasonable judgment in determining when the subject is exhausted. *Storm* v. *United States,* 94 U. S. 76, 85; *Rea* v. *Missouri,* 17 Wall. 532, 542–543; *Blitz* v. *United States,* 153 U. S. 308, 312. But no obligation is imposed on the court, such as that suggested below, to protect a witness from being discredited on cross-examination, short of an attempted invasion of his constitutional protection from self-incrimination, properly invoked. * * *

See also *Raffel* v. *United States,* 271 U. S. 494, 497.

The petitioner also complains of the refusal of the court to sustain his objections to a question asked of the brother of the petitioner who appeared as a witness. In his direct testimony this witness stated that he was a real-estate broker. Upon cross-examination he testified that he signed "a few bonds." Apparently in the course of an

inquiry about the bonds which he signed, the following occurred (R. 27):

> Q. Are you on the bond of a man named Bapple, who is charged with the violation of the narcotic law in this court?
>
> Mr. BANDY. We object as being wholly immaterial and not proper cross-examination.
>
> The COURT. Let him answer.
>
> (To which ruling of the court the defendant then and there objected.)
>
> A. Yes, sir; I am on the bond of Mr. Bapple.
>
> Mr. BANDY. We further object because of the prejudicial quality of this question. Yesterday Mr. Blockburger was asked whether he knew William Bapple and now the District Attorney injects into the evidence the fact that William Bapple is under indictment for a violation of the same act under which the defendant Harry Blockburger is being tried.
>
> The COURT. Objection overruled.
>
> (To which ruling of the court the defendant then and there excepted.)
>
> A. Yes, sir.

The petitioner's primary objection to the testimony now is that it "had not been shown that Bapple was under indictment in that court." (Br. p. 19.) But, as the testimony of the witness himself established the fact that Bapple was under indictment, this complaint seems to be without foundation.

In any event we submit that the action of the trial court in permitting the cross-examination of the petitioner and his brother above referred to was within the scope of the discretion of the court; and, moreover, that if error was committed it was not sufficiently serious to be prejudicial.

III

THE JUDGMENT SHOULD NOT BE REVERSED ON ACCOUNT OF THE REMARKS MADE BY THE PROSECUTING ATTORNEY DURING HIS CLOSING ARGUMENT

The petitioner complains of certain statements made by the District Attorney in his closing argument to the jury. (Br. p. 20, 21.) All that the record discloses in regard to the first of these is the following (R. 28):

> During the course of the closing argument of Mr. Alexander the following transpired in the presence and hearing of the jury:
>
> I am an officer of the Government and the Court is an officer of the Government, and we know Ella Rush.
>
> Mr. BANDY. The defendants object to the statement that Ella Rush is known to this Court, and we ask that the jury be instructed to disregard that statement.
>
> The COURT. The jury is instructed to disregard the statement, except that the Court has seen her here and has seen the circumstances under which she comes here.
>
> Mr. BANDY. It wasn't limited to that.
>
> Mr. ALEXANDER. That is just what I mean.

All that the record discloses in regard to the second of these matters is the following (R. 29):

> Mr. ALEXANDER. Here is a pickpocket, and he wasn't shocked at that; that is the kind of people that they associated with.
>
> Mr. BANDY. That is objected to; it is an intimation those are the people the defendant associated with. If the Court please, he says that is the kind of people these men associated with.
>
> Mr. ALEXANDER. I think it is a fair inference.
>
> The COURT. The jury will understand that this is Mr. Alexander's conclusion from the evidence.

Apparently counsel for the petitioner at the time was not dissatisfied with the action of the court in respect of either of these matters. He made no motion to withdraw the case from the jury and took no exception to what was ultimately said. It does not appear that the remarks of the District Attorney were improper, but if they were, the impropriety seems to have been cured by the comment of the court. Anyway, they are not so prejudicial that this Court should reverse the judgment in the absence of any exception. See *Dunlop* v. *United States,* 165 U. S. 486; *Chadwick* v. *United States,* 141 Fed. 225 (C. C. A. 6th); *Higgins* v. *United States,* 185 Fed. 710, 716 (C. C. A. 6th); *Luterman* v. *United States,* 281 Fed. 374, 379–381 (C. C. A. 3d), certiorari denied,

260 U. S. 732; *Gay* v. *United States*, 8 F. (2d) 219, 220–221 (C. C. A. 9th); *Silkworth* v. *United States*, 10 F. (2d) 711, 721, certiorari denied, 271 U. S. 664; *Vendetti* v. *United States*, 45 F. (2d) 543 (C. C. A. 9th).

IV

THERE IS NO MERIT IN THE PETITIONER'S EXCEPTION TO A PORTION OF THE CHARGE OF THE DISTRICT COURT TO THE JURY

The petitioner took exception to only one part of the charge. In its charge the District Court said (R. 33):

> I told you that you are the judges of the credibility of the witnesses and of the weight of the evidence. The defendant Blockburger saw fit to go upon the witness stand in his own behalf. You were entitled to know who he was. On cross-examination the Government proved by him that he had heretofore been convicted of a felony and had been an inmate of the Missouri State Penitentiary. That evidence was permitted to be submitted to the jury as a fact concerning that witness in order that you might consider it in connection with his credibility as a witness, and that is the only purpose for which it was admitted.
>
> There was a rule at one time that one who had been convicted of a felony was an incompetent witness. That is not the rule now, but he is a competent witness and the

jury has a right to take the fact of a former conviction into consideration in determining the degree of credibility they will accord to him as a witness, and, if you believe him, to act upon his testimony.

At the conclusion of the charge, the following colloquy took place (R. 34):

> Mr. Bandy [Counsel for the defendants below]: The defendants except to the statement contained in that part of the charge referring to the testimony brought out in cross-examination of the defendant Harry Blockburger that he had been convicted and confined in the penitentiary, that there was once a rule of law that one who had been convicted of a felony was an incompetent witness, the application being that that in an unreasonable way and inferentially disparages his testimony at this time, that limitation against his testimony having been removed by statute, and we except to it.
>
> The Court. The jury will disregard the reference in the charge to the law as it formerly stood with reference to the incompetency of a witness convicted of a felony.

The part of the charge excepted to seems harmless, but if there was any error it was corrected by the subsequent remark of the court. Although the petition specified this matter as error, the brief submitted by the petitioner on the merits does not mention it.

CONCLUSION

Although the sentence imposed seems unduly severe, we submit that it was authorized by law and that no ground exists upon which the judgment should be reversed. The petitioner's appeal should be to the executive.

Respectfully submitted.

THOMAS D. THACHER,
Solicitor General.

NUGENT DODDS,
Assistant Attorney General.

CLAUDE R. BRANCH,
Special Assistant to the Attorney General.

HARRY S. RIDGELY,
Attorney.

NOVEMBER, 1931.

APPENDIX

HARRISON NARCOTIC ACT

Sec. 1, as amended by the Revenue Act of 1926, c. 27, 44 Stat. 9, 97; U. S. C., Title 26, Sec. 692, so far as pertinent, provides:

* * * * *

> It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the aforesaid drugs except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps from any of the aforesaid drugs shall be prima facie evidence of a violation of this section by the person in whose possession same may be found; * * *

Sec. 2 (c. 1, 38 Stat. 785, 786; U. S. C., Title 26, Sec. 696) provides in part as follows:

> That it shall be unlawful for any person to sell, barter, exchange, or give away any of the aforesaid drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Commissioner of Internal Revenue. * * *

Section 9 (38 Stat. 789; U. S. C., Title 26, Sec. 705) provides:

> That any person who violates or fails to comply with any of the requirements of this

Act shall, on conviction, be fined not more than $2,000 or be imprisoned not more than five years, or both, in the discretion of the court.

* * * * *

U. S. GOVERNMENT PRINTING OFFICE: 1931

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No. 374

In the Supreme Court of the United States

OCTOBER TERM, 1931

HARRY BLOCKBURGER, PETITIONER

v.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

In the Supreme Court of the United States

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THE UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

At the hearing the question was raised as to whether the bill of exceptions was allowed and filed on time. An examination of the record shows that it was.

Sentence was imposed on July 20, 1929. (R. 9–10.) At that time it was ordered by the court that the defendant have thirty days within which to file his bill of exceptions. That thirty days would have expired on August 19, 1929. The orders extending the time for filing the bill of exceptions appear in two different places in the record. (R. 39–41, 46–54.) The following are the dates of the

orders and the limit of the time as extended by each:

Order of—	Extending time
August 18, 1929	Through September 18.
September 17	Through October 17.
October 17	Through November 16.
October 19	For 30 days.
November 18	Through December 18.
December 18	Through January 17, 1930.
January 13, 1930	Through February 16.
February 15	Through February 26.
February 26	Through March 25.
March 25	Through April 4.
April 4	Through May 3.
May 2	Through June 3.

The bill of exceptions was filed on May 16, 1930. (R. 10.) It appears elsewhere in the record (R. 38–39) that the judge signed the allowance and approval of the bill of exceptions on that day.

The orders extending the time were effective, although some of them were made after the expiration of the term. *Stickel* v. *United States*, 294 Fed. 808 (C. C. A. 8th); Judicial Code, Sec. 79 (Act of March 3, 1911, c. ~~209~~ 231, 36 Stat. 1087, 1110 (U. S. C., Title 28, Sec. 152)).

Respectfully submitted.

THOMAS D. THACHER,
Solicitor General.

NUGENT DODDS,
Assistant Attorney General.

CLAUDE R. BRANCH,
Special Assistant to the Attorney General.

NOVEMBER, 1931.

U. S. GOVERNMENT PRINTING OFFICE: 1931

SUPREME COURT OF THE UNITED STATES.

No. 374.—October Term, 1931.

Harry Blockburger, Petitioner, vs. The United States of America. } On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[January 4, 1932.]

Mr. Justice Sutherland delivered the opinion of the Court.

The petitioner was charged with violating provisions of the Harrison Narcotic Act: c. 1, § 1, 38 Stat. 785, as amended by c. 18, § 1006, 40 Stat. 1057, 1131, (U. S. C., Title 26, § 692);* and c. 1, § 2, 38 Stat. 785, 786, as amended, (U. S. C., Title 26, § 696).** The indictment contained five counts. The jury returned a verdict against petitioner upon the second, third and fifth counts only. Each of these counts charged a sale of morphine hydrochloride to the same purchaser. The second count charged a sale on a specified day of ten grains of the drug not in or from the original stamped package; the third count charged a sale on the following day of eight grains of the drug not in or from the original stamped package; the fifth count charged the latter sale also as having been made not in pursuance of a written order of the purchaser as required by the statute. The court sentenced petitioner to five years imprisonment and a fine of $2,000 upon each count, the terms of

*It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the aforesaid drugs [opium and other narcotics] except in the original stamped package or from the original stamped package; and the absence of appropriate taxpaid stamps from any of the aforesaid drugs shall be prima facie evidence of a violation of this section by the person in whose possession same may be found; . . ."

**It shall be unlawful for any person to sell, barter, exchange, or give away any of the drugs specified in section 691 of this title, except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Commissioner of Internal Revenue."

imprisonment to run consecutively; and this judgment was affirmed on appeal. 50 F. (2d) 795.

The principal contentions here made by petitioner are as follows: (1) that, upon the facts, the two sales charged in the second and third counts as having been made to the same person, constitute a single offense; and (2) that the sale charged in the third count as having been made not from the original stamped package, and the same sale charged in the fifth count as having been made not in pursuance of a written order of the purchaser, constitute but one offense for which only a single penalty lawfully may be imposed.

One. The sales charged in the second and third counts, although made to the same person, were distinct and separate sales made at different times. It appears from the evidence that shortly after delivery of the drug which was the subject of the first sale, the purchaser paid for an additional quantity, which was delivered the next day. But the first sale had been consummated, and the payment for the additional drug, however closely following, was the initiation of a separate and distinct sale completed by its delivery.

The contention on behalf of petitioner is that these two sales, having been made to the same purchaser and following each other with no substantial interval of time between the delivery of the drug in the first transaction and the payment for the second quantity sold, constitute a single continuing offense. The contention is unsound. The distinction between the transactions here involved and an offense continuous in its character, is well settled, as was pointed out by this court in the case of *In re Snow*, 120 U. S. 274. There it was held that the offense of cohabiting with more than one woman, created by the Act of March 22, 1882, c. 47, 22 Stat. 31, was a continuous offense, and was committed, in the sense of the statute, where there was a living or dwelling together as husband and wife. The court said (pp. 281, 286):

"It is, inherently, a continuous offence, having duration; and not an offense consisting of an isolated act.

"A distinction is laid down in adjudged cases and in textwriters between an offence continuous in its character, like the one at bar, and a case where the statute is aimed at an offence that can be committed *uno ictu.*"

The Narcotic Act does not create the offense of engaging in the business of selling the forbidden drugs, but penalizes any sale made in the absence of either of the qualifying requirements set forth. Each of several successive sales constitutes a distinct offense, however closely they may follow each other. The distinction stated by Mr. Wharton is that "when the impulse is single, but one indictment lies, no matter how long the action may continue. If successive impulses are separately given, even though all unite in swelling a common stream of action, separate indictments lie." Wharton's Criminal Law, 11th Ed., § 34. Or, as stated in note 3 to that section, "The test is whether the individual acts are prohibited, or the course of action which they constitute. If the former, then each act is punishable separately . . . If the latter, there can be but one penalty."

In the present case, the first transaction, resulting in a sale, had come to an end. The next sale was not the result of the original impulse, but of a fresh one—that is to say, of a new bargain. The question is controlled, not by the *Snow* case, but by such cases as that of *Ebeling* v. *Morgan*, 237 U. S. 625. There the accused was convicted under several counts of a willful tearing, etc., of mail bags with intent to rob. The court (p. 628) stated the question to be, "whether one who, in the same transaction, tears or cuts successively mail bags of the United States used in conveyance of the mails, with intent to rob or steal any such mail, is guilty of a single offense or of additional offenses because of each successive cutting with the criminal intent charged." Answering this question, the court, after quoting the statute, § 189, Criminal Code, (U. S. C., Title 18, § 312) said (p. 629):

"These words plainly indicate that it was the intention of the lawmakers to protect each and every mail bag from felonious injury and mutilation. Whenever any one mail bag is thus torn, cut or injured, the offense is complete. Although the transaction of cutting the mail bags was in a sense continuous, the complete statutory offense was committed every time a mail bag was cut in the manner described, with the intent charged. The offense as to each separate bag was complete when that bag was cut, irrespective of any attack upon, or mutilation of, any other bag."

See also *In re Henry*, 123 U. S. 372, 374; *In re De Bara*, 179 U. S. 316, 320; *Badders* v. *United States*, 240 U. S. 391, 394; *Wilkes* v. *Dinsman*, 7 How. 89, 127; *United States* v. *Daugherty*, 269 U. S. 360; *Queen* v. *Scott*, 4 Best & S. (Q. B.) 368, 373.

Two. Section 1 of the Narcotic Act creates the offense of selling any of the forbidden drugs except in or from the original stamped package; and §2 creates the offense of selling any of such drugs not in pursuance of a written order of the person to whom the drug is sold. Thus, upon the face of the statute, two distinct offenses are created. Here there was but one sale, and the question is whether, both sections being violated by the same act, the accused committed two offenses or only one.

The statute is not aimed at sales of the forbidden drugs *qua* sales, a matter entirely beyond the authority of Congress, but at sales of such drugs in violation of the requirements set forth in §§ 1 and 2, enacted as aids to the enforcement of the stamp tax imposed by the act. See *Alston* v. *United States,* 274 U. S. 289, 294; *Nigro* v. *United States,* 276 U. S. 332, 341, 345, 351.

Each of the offenses created requires proof of a different element. The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not. *Gavieres* v. *United States,* 220 U. S. 338, 342, and authorities cited. In that case this court quoted from and adopted the language of the Supreme Court of Massachusetts in *Morey* v. *Commonwealth,* 108 Mass. 433: "A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other." Compare *Albrecht* v. *United States,* 273 U. S. 1, 11-12, and cases there cited. Applying the test, we must conclude that here, although both sections were violated by the one sale, two offenses were committed.

The case of *Ballerini* v. *Aderholt,* 44 F. (2d) 352, is not in harmony with these views and is disapproved.

Three. It is not necessary to discuss the additional assignments of error in respect of cross-examination, admission of testimony, statements made by the district attorney to the jury claimed to be prejudicial, and instructions of the court. These matters were properly disposed of by the court below. Nor is there merit in the contention that the language of the penal section of the Narcotic

Act, "any person who violates or fails to comply with any of the requirements of this act" shall be punished, etc., is to be construed as imposing a single punishment for a violation of the distinct requirements of §§ 1 and 2 when accomplished by one and the same sale. The plain meaning of the provision is that each offense is subject to the penalty prescribed; and if that be too harsh, the remedy must be afforded by act of Congress, not by judicial legislation under the guise of construction. Under the circumstances, so far as disclosed, it is true that the imposition of the full penalty of fine and imprisonment upon each count seems unduly severe; but there may have been other facts and circumstances before the trial court properly influencing the extent of the punishment. In any event, the matter was one for that court, with whose judgment there is no warrant for interference on our part.

Judgment affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.